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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES
PETITIONERS,

v.

DOUGLAS DYNAMICS, INC.,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED

I. In a summary judgment proceeding under Rule 56(e) of the Rules of Civil Procedure should the First Circuit have applied Rule 705 of the Federal Rules of Evidence to affidavits containing expert opinions and inferences, and if so, what is its effect.

II. Under Rule 56(e) of the Rules of Civil Procedure did the Lower Court properly apply the proper legal standards to the Petitioners expert affidavits and other proof.

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Mary Hayes, as Administrator, Parent and Next Friend of Robert Hayes, Jr., the Petitioner herein, pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the First Circuit in the case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Mary Hayes Administrator of Robert Hayes, Jr. v. Douglas Dynamics, Inc.*, 8 F.3d 88 (First Cir. 1993) and is set forth in the Appendix 1a hereto. The opinion of the United States District Court for the State of Massachu-

setts affirmed by the First Circuit is not reported. It is set forth herein in its entirety in the Appendix at 15a.

GROUNDS FOR JURISDICTION

The First Circuit issued its decision on November 1, 1993. Petitioners timely filed a Petition for rehearing and suggestion for hearing en banc. The Petition was denied on December 17, 1993. In accordance with Rule 13.3 of this court, this petition for certiorari was timely filed within ninety days of the date the rehearing was denied. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The basis for Federal jurisdiction is diversity of the parties (28 USC 1254 (1).

STATUTES INVOLVED

The Statues involved are the Federal Rules of Evidence Sections 702-705; 1101, and Rule 56(e) of the Federal Rules of Civil Procedure. The Federal Rules of Evidence (28 USCS. Appendix Federal Rules of Evidence) as enacted by Congress at the time of decision in the lower Court provide in relevant part in the sections involved as follows:

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Jan. 2, 1975, P.L. 93-595, sec. 1, 88 Stat. 1937.)

RULE 703. BASIS OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived

by or made known to the expert at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (Jan. 2, 1975, P. L. 93-595, sec. 1, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987.)

RULE 704. OPINION ON ULTIMATE ISSUE

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces and ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a Respondents in a criminal case may state an opinion or inference as to whether the Respondents did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone. (Jan. 2, 1975, P. L. 93-595, sec. 1, 88 Stat. 1937; Oct. 12, 1984, L. 98-473, Title II, Ch IV, sec. 406, 98 Stat. 2067.)

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (Jan. 2, 1975, P. L. 93-595, sec. 1, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987.)

RULE 1101. APPLICABILITY OF RULES

(a) COURTS AND MAGISTRATES. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for

the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrates.

(b) PROCEEDINGS GENERALLY. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code [11 USCS secs. 1 et seq.].

RULE 56. SUMMARY JUDGEMENT

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgement, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

The Petitioners, Mary Hayes sued as Administrator of the Estate of her deceased son, Robert Hayes Jr. and as parent of Eric Hayes. Mrs. Hayes sued Douglas Dynamics, Inc. the designer, manufacturer, assembler and seller of an after-market snowplow, snowplow lift mechanism and plow to be attached to pick-up trucks in breach of warranty and negligence in a wrongful death action for the death of her son. The suit was commenced in the District Court of the District of Massachusetts. Jurisdiction is based upon diversity and a claim of a value of more than $50,000.

The Petitioners alleged that the death of her son Robert Hayes, Jr. would have been prevented if the rigid and dangerous protrusions of the Respondent's snowplow lift-mechanism had been removed from the front of the truck. The lift-mechanism is permanently attached to the front of a pick-up truck and is used to lift and lower snowplows. The lift-mechanism is made of heavy steel and protrudes in front of the grill and bumper; it is mounted in the center of the truck. It projects forward approximately 16 inches in a spear like configuration in front of the truck's hood.

The Petitioners allege that the deceased, Robert Hayes, Jr., was killed by the Respondent's product in a collision with a pick-up truck, driven by William Richardson, equipped with the Respondent's lift-mechanism. Petitioners allege that lift-mechanism crushed through the right-rear of the automobile to where Robert Hayes was seated and caused the deceased to be struck in the rear of his head by car debris pushed forward by the Respondent's snowplow lift.

The Respondent moved for summary judgment solely on the grounds of insufficiency of evidence to prove proximate cause without expert affidavits.

The Petitioner answered that motion by offering the deposition testimony of William Richardson, an eyewitness truck driver who observed the vehicles at impact, (A. 35a). Richardson stated that the Respondent's product struck the deceased's vehicle (a Ford Tempo) on the right-rear side behind the deceased. Also, the Petitioners produced the Grand Jury testimony of Police officer Paul Porter, (A. 34a) who stated that based on his observations at the accident scene, the lift-mechanism hit the right-rear of the deceased's vehicle where the victim was seated on the right-rear side.

As to the experts, the Petitioner responded with affidavits by an accident reconstructionist of national stature, the former Medical Director of NHTSA, a nationally recognized automobile crash expert, and the actual autopsy physician, along with additional depositions and other proof. The Petitioner supplemented that proof with additional underlying data, and expert reasoning, methodology and specific facts identified by the experts, such as the wedge mark at the point of impact and the imprint of the plow in the scene pictures. (A. 30a-33a and 39a) The Petitioner's proof was voluminous specific and detailed.

The reconstructionist used the materials standard in the industry for reconstruction of accidents, 104 Police scene pictures (see A. 30a-33a), Police reports with measurements, autopsy reports and pictures among other materials. The reconstructionist's methodology was standard in the industry.(A. 39a) He carefully examined the pictures and materials; he obtained exemplar vehicles and lined them up from the damage on the pictures; and re-confirmed his opinion with a photogrammetrist. (A. 39a) In addition, proof from the investigating State Police reconstructionist showed that the state police were able to reconstruct the accident from the pictures and materials also.

Moreover, the reconstructionist's methods and materials were reviewed by another expert reconstructionist and found to be proper, useful and customary materials sufficient containgin sufficient detail to reconstruct the accident and that proper and standard methodology was followed by the reconstructionist and reached reasonable inferences and opinions and conclusions.

The testimony of William Richardson, the eyewitness truck driver, (A. 35a) and Paul Porter (A. 34a), a police officer at the scene, indicated a right-rear impact of the snowplow lift behind the right-rear passenger. The expert opinion of the accident reconstructionist, Nicholas Miller indicated a wedge mark (or 'V'') at the point of impact. This is located to the left and above the ''Ford'' sticker on the right side of the trunk of the deceased's vehicle, that is, just to the left of the massive damage crush. He also located an imprint in the damage on the right rear in the scene pictures. There is no contrary proof as to the cause of this wedge mark or the massive crush damage on the right side other than the lift mechanism.

The Petitioner then requested that by reason of the vague basis of the claims against it that it be given notice and opportunity to rebut questions before the entry of a final judgment.

The Respondent did not controvert petitioner's affidavits with opposing affidavits and experts but instead relied on the insufficiency of the evidence, although Respondent had also had hired and retained an expert reconstructionist.

The District Court dismissed the action citing insufficiency of evidence to prove the lift-mechanism caused the injury and found several other possible causes including a pillar. (A. 19a, 22a, 23a, 24a) The Court contradicted the Petitioner's expert opinions, refused to credit their inferences, disputed expert conclusions reached in exercise of the expertise of the

witness and further found alternative theories not argued by either side. (A. 24a)

The District Court found sua sponte in its decision that there was another possible cause, the pillar and left-side of the car. (A. 23a, 21a, 24a) Neither party argued this cause as a possible alternative cause of the death.[1]

The Petitioners then moved for rehearing and leave to submit additional affidavits (A. 45a, et seq.). These affidavits reaffirmed the Grand Jury Testimony of Paul Porter (A. 45a); they described the imprint in detail (A. 51a) and further indicated that based on the pictures of the truck's front and the Tempo's rear the only explanation for the damage pattern on the two vehicles shown in the pictures was that the snowplow lift mechanism hit the right-rear of the deceased's car (A. 39a) at the wedge mark. The area identified by accident eyewitnesses William Richardson and officer Paul Porter. Moreover, the Petitioners submitted proof that the alleged fatal pillar was broken by the lift-mechanism (A. 47a, 51a) and further the reasoning of the Court was improper regarding the pillar per the Dr. Ommaya former Chief Medical Officer of NHTSA. (National Highway Traffic Safety Administration) (A. 56a)

These motions for rehearing and leave to submit additional affidavits were denied, and the Petitioners appealed to the First Circuit from all actions of the lower Court.

The First Circuit affirmed the District Court. The First Circuit found that the Petitioners had proven a possible cause but not a probable cause for the death of Robert Hayes, Jr. The

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[1]See also Appendix 38a where an EMT contradicts the testimoy of Paul Porter) The Court found that the Petitioners had proven only a possible cause and not a probable cause. (A.23a)

Court found the expert affidavits factually insufficient. These were based upon the scene photographs (see A. 30-33a) which the First Circuit found not sufficient for expert work. (A. 7a)

The Court expressly held that the Federal Rules of Evidence were not part of the standard to be applied on summary judgment. (A.7a, 8a) The First Circuit dismissed the case based on the insufficiency of facts to support the opinion of the experts and further that the testimony of Paul Porter and William Richardson were not themselves specific facts sufficient to create a genuine question of fact.(A. 5a-14a) The Court interpreted the pictures to show damage to the right side (A. 6a, 7a) but not to show an impact by the lift-mechanism or a cause for said damage. The defense had not contended that the lift mechanism missed the Tempo. The Court did not decide what part of the truck hit what part of the Tempo.

Petitioners then moved for rehearing and a Suggestion for Rehearing En Banc. This was denied, but an errata page was issued adding the word "largely" to its finding that Rule 705 was not intended for use on summary judgment motions. (A. 29a)

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S DECISION THAT THE FEDERAL RULES OF EVIDENCE AT SECTION 705 WERE NOT INTENDED TO APPLY ON SUMMARY JUDGMENT MOTIONS IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE FOURTH, NINTH, AND DISTRICT OF COLUMBIA CIRCUITS. IT IS IN DIRECT CONFLICT WITH THE RULES OTHERWISE IN THE EIGHTH AND TENTH CIRCUITS. THUS THE CONGRESSIONAL MANDATE THAT THE RULES APPLY UNIFORMLY IN ALL COURTS HAS BEEN FRUSTRATED IN AN AREA VITAL TO THE FUNCTIONING OF THE LOWER COURTS AND CERTIORARI SHOULD ISSUE.

The Federal Rules of Evidence were passed by Congress in 1975. Its purpose was to liberalize the rules of evidence from the common law then applying, and to provide a unified standard for evidence in all proceedings in Federal Courts.

As to expert testimony, the rule that had applied prior to the Federal Rules of Evidence was that experts could not testify except in response to a hyhpothetical question. That question was required to be based upon evidence already in the record before the expert could testify. The Federal Rules of Evidence at Rules 703-705 were passed by Cognress so as to eliminate the requirement of the hypothetical question and the consequent evaluation of the basis of the testimony by the court.

The new Rule 705 removed this burden from the party offering the expert. It placed a new burden upon the Court and the opposing party to set forth what elements of significance it was believed must have been overlooked or misapplied by the expert. In the 19 years since the enactment of the Federal Rules of Evidence there has not been any dissatisfaction with the Rules in this particular.

The First Circuit in this case for the first time in 20 years has refused to apply the Federal Rules of Evidence at Rule 705 in summary judgment proceedings. It has directly and expreslly held that Rule 705 applies "largely" to trials. It accordingly refused to apply Rule 705 to this case.

It is the only Circuit to have ever refused to apply the section in summary judgement proceedings. In every other Circuit the Federal Rules of Evidence are applied.

In the other Circuits the effect of the application of the Federal Rules of Evidence is two fold. The first is to require that the Court must give notice prior to any final decision or order of its intention to dismiss based on inadequacies in the expert affidavits, and furnish an opportunity to supply the inadequacies before entry of final decision and order. The second is to restrain the court from determining any more than that the expert was qualified and that the methodology was that used in the expert field. Thus the First Circuit is in direct conflict with the Fourth, Ninth, and District of Columbia Circuits. It is in conflict with the Eighth and Tenth Circuit which without reference to Rule 705 reached the same result as that reached in the Fourth, Ninth, and the District of Columbia.

The First Circuit in this case turned the clock back 19 years. It violated both restrictions of Rule 705 of the Rules of Federal Evidence. It did not give any notice of the alleged deficiencies in the expert opinion before final decision and order of dismissal despite request therefor. Further faced with uncontroverted proof that the experts were qualified, indeed leaders in their fields, and that they had followed standard methodology, it substituted its own judgment on the facts and disallowed the expert from making inferences favorable to the Plaintiff and from expressing an opinion used by the court. The First Circuit then proceeded to find facts contrary to the experts and to dismiss the action.

The First Circuit is the first and only Circuit to claim such rights by reason of the failure to apply Rule 705 of the Federal Rules of Evidence.

In the 19 years since the passage of the Federal Rules of Evidence this court has never visited Rule 705 of the Federal Rules of Evidence and given guidance to the Lower Courts as to the standards Lower Courts are to follow in reconciling Section 56(e) sufficient fact standard of the Federal Rules of Civil Procedure, and Seciton 705 of the Federal Rules of Evidence Allowing testimony by opinion and inferences by an expert. Disparate standards requiring certiorari have now resulted.

In summary certiorari should issue because the Circuits are in conflict and without guidance from this court in an area of daily application in the lower courts, and one in which the Congress intent that uniformity and liberality in evidence matters has been frustrated. It should also issue in view of the Constitutional right to jury trial a writ should also issue to determine the role of the lower courts in issue determination where expert affidavits are offered. It should also issue in the interests of justice in this case where the Plaintiff, despite national and international recognized experts, has been turned away from a jury trial on standards that are subjective, unreviewable, capricious and without record support.

A. THE FIRST CIRCUIT'S HOLDING THAT RULE 705 OF THE FEDERAL RULES OF EVIDENCE DOES NOT APPLY TO EXPERT AFFIDAVITS OFFERED IN A RULE 56 (e) PROCEEDING DIRECTLY CONFLICTS WITH DECISIONS IN THE DISTRICT OF COLUMBIA, THE FOURTH, AND THE NINTH CIRCUITS.

The First Circuit held in this case (A. 7a):

> "Petitioners's reliance on Federal Rule 705 which allows an expert to give opinion testimony, together with the supporting reasons, without disclosure of the underlying facts is "largely" inapposite. This rule was designed to apply in the context of a trial where cross examination provides and opportunity to probe the expert's underlying facts and data test the conclusions reached by the expert." *Hayes v. Douglas Dynamics Inc.*, 8 F.3d 88 (1st Cir. 1993) (See Appendix)

This holding marks an unprecedented rejection of a Federal Statute. It conflicts directly with the holdings of three other circuits the District of Columbia, the Fourth and the Ninth Circuits. (*Ambrosini, et al v. Jorge Labaraque, M.D.*, 966 F.2d 1464, (D.C. Cir. 1992); *Mendes-Silva v. U.S.*, 980 F.2d 1482 (D.C.Cir. 1993); *M&M Medical Supplies v. Pleasant Valley Hosp.* 961 F.2d. 160 4th Cir. 1992.)

In direct conflict with First Circuit is in *Bulthuis v. Rexall Corporation* 789 F.2d 1315, 1317, 1318 (9th Cir. 1985). The Ninth Circuit then held that on summary judgment:

> "By the express terms of the Fed R. Evid. 705: The expert may testify in terms of opinion or inferences and give his reasons therefore without prior disclosure of the underlying facts or data unless the court requires otherwise. The court did not "require otherwise in this case"; it simply accorded the declarations of opinions no weight and simply granted summary judgment against the plaintiff.
>
> * * * * *
>
> "The two cases demonstrate the proper accomodation between rule 56 (e) and Fed R. Evid. 705. Expert opinion is admissible and may defeat summary

> judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinions is stated in the affidavit even though the underlying factual details and reasoning upon which the opinion is based are not. If further facts are desired the movant may request and the district court may require their disclosure."

In *M&M Medical Supplies and Service Incorporated v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160 (4th Cir. 1992)(En Banc) *cert. denied*, 113 S.Ct. 2962; 135 L.Ed. 2d 662 (1993). The Fourth Circuit followed *Bulthuis v. Rexall Corporation Supra*. It cited as in accord the Sixth Circuit case of *Monks v. General Electric Co.* 919 F.2d 1189, 1192 (6th Cir. 1990) and the District of Columbia case of *Ambrosini v. Laborraque* 966 F. (2) 1464, 1470-72 (D.C. Cir. 1992) for its holding at page 165 that:

> "Nevertheless Fed. R. Civ. P. 56 (e) and Fed. R. Evid. 705 can be reconciled with respect to data supporting the facts. Neither rule requires prior disclosure of the supporting data-in this case patients addresses and DME prices. Furthermore, both rules contemplate supplementation of the expert's affidavit to disclose supporting data if the court deems the disclosure supporting data if the court deems the disclosure to be necessary before it decides the motion for summary judgment."

And its holding at page 166:

> "...An affidavit that states facts on which the expert basis an opinion satisfies Fed. R. Civ. P. 56 (e) even though the expert does not attach the data supporting the facts. If need be the court acting pursuant to Fed. R. Civ. P. 56 (e) and Fed. R. Evid.

> 705 can require the expert to furnish the supporting data."

The District of Columbia Circuit has recently held that the Federal Rules of Evidence at Rule 705 apply to expert affidavits in the case of *Ambrosini, et al v. Jorge Labaraque, M.D.*, 966 F.2d 1464, (D.C. Cir. 1992) There that court squarely held that Rule 705 of the Federal Rules of Evidence apply to expert affidavits offered in Rule 56 (e) motions in the following words of pg. 1468:

> "Under Rule 705 an expert affadavit, no matter what the basis, cannot be excluded solely because it fails to disclose the facts or data underlying the opinion.
>
> * * * * *
>
> "At that point pursuant to Rule 705 the court could have required Dr. Strom and Dr. Goldman to disclose the basis for their opinions so that it could determine whether the opinions had an adequate foundation. . .
>
> * * * * *
>
> "Only then could the court determine whether the affidavits were admissible under Rule 703 . . . .
>
> * * * * *
>
> "Because the court never delved further into the basis for the expert opinions, particularly the one supplied by Dr. Goldman *see infra* pp 1470-71 we are persuaded that the court acted prematurely in granting summary judgment on the basis of *Richardson*.

It followed the above *Ambrosini* decision (*supra*) with its decision in *Mendes-Silva v. U.S.*, 980 F.2d 1482 (D.C.Cir. 1993). The Circuit Court for the District of Columbia again

applied the Federal Rules of Evidence and declined to affirm a District Court grant of dismissal on summary judgment by reason of the District Court's *Amrosini* lack of foundation in expert affidavits. It advised the Lower Court as follows at pages 1488, 1489:

> "The District court's decision insofar as it is founded on the insufficiency rather than the admissibility of the evidence, improperly evaluates the credibility of witnesses and the weight of conflicting scientific arguments. Those determinations must be left to fact finding, and are therefor inappropriate for the summary stage of the proceedings. The district court erred in granting the government's motion for summary judgement. It was error to conclude the opinions of Ms. Mendes-Silva's experts were inadmissible under Rule 703 because there was insufficient evidence on the record to support a finding that the evidence upon which they relied is not of the type reasonably relied upon by experts in the field. Furthermore Drs. Bulle and Posner made specific factual allegations regarding causation and relied upon specific scientific data more than adequate to withstand a motion for summary judgement."

Thus, the decision of the First Circuit that Section 705 of the Federal Rules of Evidence is inapposite and contradicts with the other Circuits, which hold that Fed R. Evid. 705 applies, and its effect is to create a duty on the Court before final judgment to point out the alleged deficiences in the expert proof.

The First Circuit's holding is in direct conflict with the Fourth, Ninth, and the District of Columbia Circuits.[2] It is also

[2]The Rule in the Eighth Circuit, while not made on the express basis of Rule 705 of the Federal Rules of Evidence, is more liberal than the above Circuits: *See Hughes v. American Jawa, Ltd.*, 529 F.2d 21, 23 (8th

wrong. The Federal Rules of Evidence are statutes of the United States. They apply to all proceedings in the Federal Courts. Under that Section the Petitioner had a right to at least to prepare a proper record if one be needed. Instead, she was foreclosed from a jury trial that would have occurred by this time in three other Circuits.

Furthermore, the Supreme Court recently held in *Daubert v. Merrell Dow Pharmaceutical Company.* — *U.S.*—: 113 S. Ct.2786: 125 L.Ed. 469 (1993) the following as to the Federal Rules of Evidence:

> The drafting history makes no mention of Frye and a rigid "general acceptance" requirement would be at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony. *Beech Aircraft Corp. v. Rainey,* 488 U.S. at 169 (citing rules 701 to 705)

A liberal approach to evidence and expert opinion matters is the intention of Congress and the Federal Rules of Evidence should apply without qualifiction to summary judgment proceedings. One can only wonder what the standard for admissibility of expert affadavits apply if the Federal Rules of Evidence are largely inapposite on admissibility.

Cir. 1976) which states: "Dr. Gately had adequate qualifications to testify as an expert. His opinion and basis or reasons therefore were for the consideration of the trier of fact, be it Court or jury, and did not present a proper issue to be resolved by means of summary judgment." The rule in the 10th Circuit is in accord with *Key v. Liquid Energy Corp.*, 906 F.2d 500 (10th Cir. 1990).

B. THE FIRST CIRCUIT IS IN SQUARE CONFLICT WITH THE DISTRICT OF COLUMBIA CIRCUIT ON THE DUTY OF THE LOWER COURT TO OFFER AN OPPORTUNITY TO SUPPLEMENT EXPERT AFFIDAVITS BEFORE FINAL DECISION

The First Circuit failed to grant the Petitioners' request for leave to submit supplemental affidavits before final decision and final order. This ruling squarely conflicts with that of the District of Columbia Circuit and the Fourth and Ninth Circuits where District judges are directed to offer to the Respondent who offers expert affidavits an opportunity to supply any matters deemed sufficient to allow dismissal.

The District of Columbia in *Ambrosini et al v. Jorge Labaraque M.D.*, 966 F.2d 1464, (D.C. Cir. 1992) stated in reversing the dismissal of expert affidavits as conclusory and factually insufficient in regard to Rule 705:[3]

> "Because the Court below never delved further into the basis for the expert opinions, particularly the one supplied by Doctor Goldman *see infra* pp. 1470-71 we are persuaded that the Court acted prematurely in granting summary judgment on the basis of *Richardson.*"

The First Circuit approach to summary judgment and Rule 56(e) specific facts requirement did not allow the Petitioners herein to supplement their factual submissions before dismissal under Rule 705. This squarely conflicts with the standard of the District of Columbia and the Fourth and Ninth Circuits. The Petitioners herein have never had an opportunity to further identify the wedge mark or imprint in question and should

[3]See also the text above regarding supplementation of proof.

have been given the chance to do so before dismissed in all fairness. When the District Court refused to admit an expert opinion that stated the point of impact and an imprint were visible in the scene pictures because it could not find them without asking where the marks were, a serious injustice was done which the Petitioners can remedy in a minute.

C. THE FIRST CIRCUIT IS IN SQUARE CONFLICT WITH THE DISTRICT OF COLUMBIA CIRCUIT AND THE GOVERNING LAW OF THE STATE OF MASSACHUSETTS WHEN IT SPECULATED AS TO THE EXISTENCE OF POSSIBLE ALTERNATIVE CAUSES AND ON THAT BASIS DISMISSED THE ACTION IN VIOLATION OF FED. R. EVID. 705

The First Circuit determined that the Petitioners had proven that the Respondents product was a possible cause of death, but that there were other alternative unexplained possible causes of injury that could have also caused death. On that account it found there was a lack of probability that the Respondent's product caused the death of Robert Hayes and dismissed the action. (A. 6a, 7a)

The other possible alternative causes were variously stated to be the alleged existence of a piece of metal next to the deceased; and unknown objects that could have been in the interior of the vehicle — and other unknown and unnamed causes.[4]

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[4]The Court found one possible alternative cause to be the presence of a pillar near the deceased at the scene. (A. 6a) The existence of this piece is disputed by another witness, an EMT (A. 37a). In any event the Petitioners claimed that the Respondent's product caused this pillar to strike the deceased. (A. 47a, 53a] in his supplemental affidavits.]

There is no proof that any of the alleged possible causes were proven to the level of Plaintiffs cause. The defendant offered no such proof. In the case of the alleged pillar the court itself raised that issue.

This holding on possible causes is in direct conflict with the law of the State of Massachusetts.

In *Carey v. General Motors Corp.*, Mass.387 N.E.583. the highest Court of the State of Massachusetts held:

> "An expert's opinion based on facts in evidence is sufficient proof of causation. *McLaughlin v. Bernstein*, 356 Mass. 219, 226, 249 N.E.2d 17, (1969). The plaintiffs are not required to eliminate entirely all possibility that the Respondents's conduct was not a cause. It is enough that they introduce evidence from which reasonable men may conclude that is more probable that the event was caused by the defendant than it was not. Restatement (second) of Torts 433B comment (b) (1965)."

Further the holding is in square conflict with the First Circuit the District of Columbia Circuit has specifically held such speculation is not part of the standard for review under a summary judgment motion. *Mendes-Silva v. U.S.*, 980 F.2d 1482 (D.C.Cir. 1993).

The court found other possible causes without foundation in the record while reviewing for sufficiency of the evidence is prohibited from finding new theories sua sponte and dismissing a case based thereon by Rule 705 and other provisions of the law and the United States Constitution. This approach is fundamentally unfair because the plaintiff cannot anticipate the theories and facts to refute without prior notice.

D. THE FIRST CIRCUIT WAS IN SQUARE CONFLICT WITH THE DISTRICT OF COLUMBIA AND OTHER CIRCUITS AS TO THE ROLE OF LOWER COURT JUDGES IN EVALUATING EXPERT AFFIDAVITS ON A RULE 56 MOTION

The court completely disregarded the limitations placed upon it by Rule 705 because there is no enunciated standard regarding Rule 705. Below is a short list of the problems:

Among the insufficiencies found by the First Circuit was the expert reliance upon scene photographs of damage to the vehicles. The First Circuit could not discern what the experts had discerned from the damage pictures: namely, the impact mark and plow imprint, and so discarded the experts' opinion and inferences based thereon.

The unconverted proof in the record was that the experts had used proper methodology; relied on standard materials, and had materials of usable quality showing specific damage from the lift mechanism to wit: namely, a wedge mark and lift mechanism imprint. (A. 40a) The accident was reconstructed by the state police from the same materials.

In the case of the accident reconstructionist his work was reviewed by another reconstructionist who stated the former had followed proper methodology and the materials were sufficient in the trade for this use.

The First Circuit also cast aside the Boston Medical Examiner's affidavit as to what he observed in the examiner's autopsy pictures, what the autopsy pictures meant along with his observations regarding the bruise (A. 30a) and the alleged defective product's size and shape. (A. 39a) The First Circuit Court, exercising its own expertise, disagreed with the Boston Medical Examiner based on his visual observations of the bruise. (A. 11a)

There was no contrary proof before the lower courts to support a finding on these subjects. As a result the judges' findings were pure speculation. This speculation was made sua sponte in the case of some of the alternate causes.

Inferences from lay eyewitness testimony (A. 35a) were also not allowed, *e.g.*, that based on the observed position of the vehicles at impact behind the occupant and the location of the snowplow lift on the center of the truck: the inference is that the snowplow lift hit the Tempo as stated by the driver.

The testimony of Paul Porter was ignored. (A-34) He stated that the lift mechanism hit the right rear of the Tempo.

The pillar theory is contradicted by the Testimony of Alan Royer (A. 38a) who states nothing was on the head of the deceased.

Rule 705 was designed to prevent Judges from becoming experts without qualifications by limiting their factual inquiry authority into expert opinions. Reviewing for sufficiency of evidence is not authority to weigh evidence, find facts, overlook evidence or determine crediblity.

Additionally, the First Circuit during its investigation of sufficiency based upon its own sua sponte examination of the scene photographs of the vehicle in which the deceased was riding, found that the photographs showed massive right side damage (see A. 7a) but found no cause for this damage. They stated that it suggested a number of "different possibilities." The Lower Court never tried to align this damage with the damage shown on the front of the truck to limit the causes as our reconstructionist did to see what part of the truck hit what part of Tempo.

In *Mendes-Silva v. U.S.*, 980 F.2d 1483, 1488 (D.C.Cir 1993) the District of Columbia Circuit forbade such action. It stated:

> "The district Court's decision in so far as it is founded on the insufficiency rather than in admissibility of the evidence improperly evaluates the credibility of witnesses and the weight of the conflicting scientific arguments. These determinations must be left to the fact finding and are therefore inappropriate for the summary judgment stage of proceedings."

Without any training in evaluating automotive damage from Police pictures or courses in mechanical engineering it is difficult to see what common standard will be applied by the Judges or if they have any familiarity with expert practice in a given field. Assuredly, there will be no standard at all since each judge will be entering a field he is untrained to decide based upon differing personal ad hoc standards depending upon his time, patience, skill or personal insight.

Appellate review will be rendered useless because there will always be, as in this case: a "the suggestion of a difference of possibilities" resulting in widely different results leaving the Respondent like the Petitioner herein vainly trying to anticipate what conceivable misconceptions or misuses of the evidence could occur and how to avoid dismissal thereon by refuting unseen phantoms. Under longstanding Massachusetts Law the Petitioner does not have this burden. The District of Columbia circuit is in conflict also. Thus, Certiorari should issue to resolve this conflict.

II.

THE ISSUES INVOLVED DIRECTLY AFFECT THE ADMINISTRATION OF LARGE NUMBERS OF CASES IN THE LOWER COURT WHERE THERE IS NO UNIFORMITY WHERE CONGRESS HAS MANDATED UNIFORMITY

This Court has not yet directed the Lower Courts as to the standard to be applied to expert affidavits offered on Summary Judgement motions in relation to Rule 56 (e) specific facts requirement under Rule 705 when reviewing for sufficiency of the evidence.

In the absence of that direction the Circuit Courts have developed ad hoc standards, differing in interpretation, reasoning application and effect as they review for sufficiency of the evidence. The First Circuit is the most extreme example. At the other end of the picture is the Eigth Circuit (*Hughes v. American Jawa, Ltd.*, 529 F.2d 21 (8th Cir. 1976), and in between are the other circuits.

Thus, at the present time there is no uniformity in the Circuits as to the role of the Judge evaluator or the standards, if any, governing the role of the Judge evaluator under these circumstances.

The lack of uniformity involves the role of the Federal Rules of Evidence in the evaluation process. Those Rules carry a Congressional mandate for uniformity. The lack of uniformity in the legal standard that applies exists in an area of Court jurisprudence which is widely used and has wide repercussions.

There were over 20,736 reported cases involving judgment motions reported in the last ten years. There were innumerable additional unreported decisions. By estimate these exceed the reported decisions. Expert affidavits are commonly

involved on summary judgment. Thus, the existing lack of uniformity affects a wide band of jurisprudence under this Court's direction and control.

This case is particularly well suited to deal with the issues of opinion testimony, and the Federal Rules of Evidence in the Rule 56 context. It raises commonly occurring questions.

The standards in this area are non uniform nationwide and conflict from circuit to circuit and even judge to judge in many particulars. Accordingly, certiorari should issue.

CONCLUSION

For the foregoing reasons, the petition for writ certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-2374
No. 93-1033

MARY HAYES, ADMINISTRATOR OF THE ESTATE OF ROBERT HAYES, JR., AND ERIC HAYES,
Plaintiffs, Appellants,

v.

DOUGLAS DYNAMICS, INC.,
Defendant, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. A. David Mazzone, *U.S. District Judge)*

Before
Boudin and Stahl, *Circuit Judges,*
and Fuste, **District Judge.*

John Benjamin Carroll with whom *Woodruff L. Carroll* was on brief for appellant.

John L. Kerr with whom *Whiting & Elinoff* was on brief for appellee.

November 1, 1993

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*Of the District of Puerto Rico, sitting by designation.

FUSTE, *District Judge*. Appellants Mary and Eric Hayes appeal from a grant of summary judgment in a negligence and breach of warranty action resulting from a car accident in which Robert Hayes, Jr., the son of Mary and brother of Eric, was killed. The district court held that plaintiffs failed to adduce adequate evidence to show that defendant's product was the proximate cause of the decedent's fatal injury. We affirm.

I.

Background

On January 30, 1988, Robert Hayes, Jr. and his brother Eric were passengers in the rear compartment of a Ford Tempo. Robert, Jr. was sitting in the right rear passenger seat, and Eric was sitting behind the driver's seat. While the car was stopped at an intersection, waiting to make a left turn, it was hit from behind by a Chevrolet pickup truck. The driver of the truck attempted to swerve and avoid the car. The collision pushed the car into oncoming traffic where it was hit in the left front area by a van. The car spun one-hundred and eighty degrees before coming to rest. Robert, Jr. died the following day from a head injury sustained in the accident. The cause of death was a blow to the back of the head, behind the right ear. The other three passengers suffered minor injuries.

Exactly which part of the truck hit the Tempo is a central issue in this case. The Chevrolet truck was fitted with a Western brand snowplow manufactured by defendant-appellee Douglas Dynamics. The snowplow unit is designed so that the frame, consisting of a metal hydraulic pump and motor unit with a metal lift channel, can remain attached to the truck even when the snowplow blade is removed. The blade was not attached to the truck at the time of the accident. Part of the lift

channel consists of a lift arm which protrudes outward from the front of the truck. The end of the lift arm is a U-shaped plate approximately 2 inches by 3½ inches in dimension.

II.

Theories of Recovery and Defense

Plaintiffs brought a diversity jurisdiction suit in federal district court alleging breach of warranty[1] and negligence and contending that defendant is liable for the wrongful death of Robert, Jr. and the mental injuries suffered by Eric Hayes as a result of seeing his brother sustain the fatal injury. The plaintiffs' theory is that the protruding lift arm of defendant's product caused the death of Robert, Jr., either by directly striking his head, or by propelling forward some metal piece of the Tempo which then dealt the fatal blow to his head. The plaintiffs also argue that the presence of the plow frame on the truck altered the dynamics of the pickup, making it more dangerous in a collision.

In order to succeed in a claim for breach of warranty under Massachusetts law, the plaintiff must show that the defendant's product was the proximate cause of the injury. *Colter v. Barber-Greene Co.*, 403 Mass. 50, 61, 525 N.E.2d 1305, 1312 (1988); *Swartz v. General Motors Corp.*, 375 Mass. 628, 633, 378 N.E.2d 61, 65 (1978). A plaintiff alleging that a product was negligently designed can proceed by showing that the product either proximately caused or enhanced the injuries alleged. *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 212, 596 N.E.2d 318, 323 (1992). Because it is undisputed that Robert, Jr. was killed by a single blow to the head, the plaintiffs must show that the plow frame either caused the

[1]Under Massachusetts law, the theory of breach of an implied warranty of merchantability is basically the same as strict liability theory in tort. *Wolfe v. Ford Motor Co.*, 386 Mass. 95, 100, 434 N.E.2d 1008, 1011 (1982).

injury or that the injury would not have been fatal if the frame had not been attached to the truck. If the plaintiffs cannot prove that the plow frame was the proximate cause of the fatal injury itself, or that it caused an enhancement of a lesser injury, then the defendants are entitled to summary judgment as a matter of law.

Proximate cause is a legal definition which requires that the precipitating object or action "in a continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred." *Wallace v. Ludwig*, 292 Mass. 251, 254, 198 N.E. 159, 161 (1935). A plaintiff need not prove the exact cause of the accident or disprove every possible cause, but he must show that there is a greater likelihood that the accident resulted from the defendant's negligence than that it did not. *Enrich v. Windmere Corp.*, 416 Mass. 83, 616 N.E.2d 1081, 1084 (1993). Therefore, in order to proceed with their claims, the plaintiffs here must be able to show that there is a greater probability that the lift arm caused the death of Robert, Jr. than that some other object in the crash was the agent of injury.

Defendant alleges that the evidence offered by plaintiffs is insufficient to establish that there is a genuine issue of fact as to whether the snowplow, directly or indirectly, caused the injury to Robert, Jr. Accordingly, the defendant filed a motion for summary judgment. Plaintiffs opposed and filed a cross-motion seeking similar relief. The district court granted the defendant's motion for summary judgment. The plaintiffs appeal the grant of summary judgment and the denial of their cross-motion. Plaintiffs also challenge several prejudgment rulings of the district court.[2]

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[2]Because we affirm the grant of summary judgment to the defendant, we do not reach the other issues raised on appeal by the plaintiffs.

III.

Summary Judgment and Standard of Review

The purpose of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial". *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) (quoting Fed. R. Civ. P. 56 Advisory Committee's Note). Therefore, if the pleadings, depositions, answers to interrogatories, admissions and any affidavits on file show that there is no genuine issue as to a material fact, then the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Where, as here, the moving party does not have the burden of proof at trial, that party must make a showing that the evidence is insufficient to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, (1986). Once this showing has been made, it is up to the nonmoving party to establish the existence of a genuine disagreement as to some material fact. *United States v. One Parcel of Real Property*, 960 F.2d 200, 204 (1st Cir. 1992). In this context, "genuine" means that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party", and a "material fact" is one which "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986).

Appellate review of summary judgment decisions is plenary. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). In applying this standard, we view the record in the light most favorable to the nonmovants, the plaintiffs. *Bank One Texas, N.A. v. A.J. Warehouse, Inc.*, 968 F.2d 94, 97 (1st Cir. 1992).

IV.

Discussion

In support of their claims, the plaintiffs offer direct evidence in the form of the depositions of witnesses and photographs from the scene, as well as the affidavits of several experts.[3]

A. Direct Evidence

1. Paul Porter

Paul Porter, a police officer who arrived immediately after the accident, testified that based on his examination of the vehicles, he believed that the front of the truck, with an emphasis on the left front quarter, struck the right rear of the Tempo. Porter stated that he saw "the plow frame and front end as one entity," and did not think that the plow frame did

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[3]Following the order of the district court granting summary judgment, the plaintiff moved to submit further evidence under Fed. R. Civ. Pro. 59(e) and 60(b)(6). The denial of these motions is also challenged on appeal. Decisions of the district court under these rules are reviewed for abuse of discretion. *Valley Citizens for a Safe Environment v. Aldridge*, 969 F.2d 1315, 1317 (1st Cir. 1992) (Rule 60(b)); *Mariani-Giron v. Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991) (Rule 59(e)). A Rule 60(b)(6) motion will be granted by a district court only if it finds "exceptional" circumstances that justify "extraordinary" relief. *United States v. One Urban Lot*, 882 F.2d 582, 585 (1st Cir. 1989). Rule 50(e) motions are granted for reasons such as the commission by the trial court of a manifest error of law or fact, the discovery of new evidence, or an intervening change in the law. *National Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 124 n.2 (1st Cir. 1990)(citations omitted). Plaintiffs presented no reasons to the district court which would warrant relief under 60(b) or 59(e). The judge noted that none of the information presented was new, nor was it unavailable when the summary judgment was filed. In addition, he stated that the new evidence would not have changed his prior analysis. We are unable to find any reasons in the record to justify the submission of further evidence, and plaintiffs have not advanced any. Therefore we find that it was not an abuse of discretion for the court to deny the plaintiff's motions, and we will not consider the additional affidavits on appeal.

all of the damage to the Tempo. Porter testified that no blood or hair samples were found on the plow frame itself. In addition, Porter stated that when he arrived at the accident scene, Robert, Jr. was still in the car. The officer observed that the boy was pinned under a piece of the Tempo, a metal pillar from between the side rear window and the rear window. The pillar was leaning aginst the head of Robert, Jr., behind his right ear.

Because Porter did not distinguish between the plow frame and the front of the truck, his testimony does not help to establish that the snowplow frame, directly or indirectly, caused the death of Robert, Jr. Porter's testimony about the lack of blood or hair on the plow frame tends to refute the theory that the lift arm itself came into contact with the victim's head. In addition, the officer's observation of the metal pillar leaning against the decedent's head suggests one alternative explanation for how Robert, Jr. may have received the head injury.

2. William Richardson

William Richardson, the driver of the truck, stated that he hit the car off-center because he swerved in an attempt to avoid the accident. He testified that approximately the center of the front end of his truck hit the right rear passenger side of the Tempo, but he was unable to see whether the lift arm itself impacted the car. Richardson's testimony establishes that the right rear passenger area of the Tempo received the brunt of the collision. Due to this, it is understandable that the injury to Robert, Jr. was more severe than that to any other occupant of the car. Because Richardson could not see what happened to the lift arm during the collision, his testimony does not help to establish a causal link between defendant's product and the injury to the victim.

3. Police Photographs

The police photographs offered by the plaintiffs depict a mangled mass of metal in the right rear passenger area of the

Tempo, and some damage to the left front of the truck. The pictures show that the damage to the right rear part of the car was far more extensive than that sustained by the left rear region. The photographs do not further the plaintiffs' claim that the defendant's product caused the injury, but rather suggest a number of different possibilities for what might have hit Robert, Jr. on the head.

Wolf Technical Services, an engineering consulting firm, was employed to analyze the photographs of the accident. The consultants concluded that the rear seat back was moved forward approximately 11.5 inches on the left end and 24 inches on the right end, and the rear bumper was displaced approximately 15 inches at the left end and at least 30 inches on the right side. These results are consistent with the other evidence that the right rear part of the Tempo sustained the brunt of the damage. However, as the district court pointed out, the study does not establish that the plow frame caused the seat back and fender to move forward.

The plaintiffs claim that the lift mechanism caused, among other damage, a wedge shaped mark on the trunk lid of the Tempo. If shown, this might help to establish that the lift mechanism played a major role in the accident. As noted by the district court, however, no such mark is visible in the police photographs.

B. Expert Witnesses

The plaintiffs have produced the affidavits of a number of expert witnesses and argue that, under Federal Rule of Evidence 705, we must accept the conclusions of these experts. While nonmovants may rely on the affidavits of experts in order to defeat a motion for summary judgment, such evidence must still meet the standards of Rule 56. Fed. R. Civ. P. 56(e) requires that the nonmoving party "set forth

specific facts showing that there is a genuine issue for trial." Plaintiff's reliance on Federal Rule of Evidence 705, which allows an expert to give opinion testimony, together with the supporting reasons, without disclosure of the underlying facts or data, is inapposite.[4] This rule was designed to apply in the context of a trial, where cross-examination provides an opportunity to probe the expert's underlying facts and data and to test the conclusions reached by the expert.

Although expert testimony may be more inferential than that of fact witnesses, in order to defeat a motion for summary judgment an expert opinion must be more than a conclusory assertion about ultimate legal issues. *Bowen v. Manchester*, 966 F.2d 13, n.16 (1st Cir. 1992). *See also Moody v. Boston and Maine Corp.*, 921 F.2d 1, 5 (1st Cir. 1990); *Sultis v. General Motors Corp.*, 690 F. Supp. 100, 103 (D. Mass. 1988). The evidentiary rules regarding expert testimony at trial were "not intended . . . to make summary judgment impossible whenever a party has produced an expert to support its position." *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977). We are not willing to allow the reliance on a bare ultimate expert conclusion to become a free pass to trial every time that a conflict of fact is based on expert testimony. As with all other evidence submitted on a motion for summary judgment, expert affidavits must be reviewed in light of F.R.Civ.P. 56.

Where an expert presents "nothing but conclusions — no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected", such testimony will be

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[4]Fed. R. Evid. 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

insufficient to defeat a motion for summary judgment. *Mid-State Fertilizer v. Exchange Natl. Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989). *See also Evers v. General Motors*, 770 F.2d 984, 986 (11th Cir. 1985); *Bulthuis v. Rexall Corp*, 789 F.2d 1315, 1318 (9th Cir. 1985). Although an expert affidavit need not include details about all of the raw data used to produce a conclusion, or about scientific or other specialized input which might be confusing to a lay person, it must at least include the factual basis and the process of reasoning which makes the conclusion viable in order to defeat a motion for summary judgment. We find that each of the expert affidavits failed to contain sufficient support for the conclusion that the injury to Robert, Jr. was caused by the defendant's product.

1. Nicholas Miller

Nicholas Miller, an expert in accident reconstruction, used the police report, autopsy report, death certificate, hospital and medical records, depositions, pictures of the accident scene and vehicles, and the study conducted by Wolf Technical Services, in order to reconstruct the accident. Miller also utilized similar vehicles to simulate the relative positions of the truck and the Tempo before impact, and conducted a video computer graphic reenactment. Based on this input, Miller concluded that the lift mechanism caused Robert, Jr.'s injuries.

Miller opines that the deceased was struck by sheet metal pushed forward by the lift arm of the snowplow. He explains his reasoning as follows: (1) the fatal blow was by an object of the same size, shape and rigidity as the lift arm; (2) there was no other object of similar shape, size, and rigidity near the decedent's head; (3) therefore, defendant's product caused the injury. Even assuming that the victim was killed by an object of the dimensions and shape of the lift arm ("rigidity" was never further discussed by any of the experts), Miller's bald assertion that no other part of the car or truck had that

particular shape is difficult to accept, given that Miller never had the opportunity to examine the Tempo after the accident. The photographs of the Tempo after the crash are not sufficiently clear to establish the shape and size of each of the pieces of the wreck. Miller claims to have eliminated all other possibilities as to what could have struck Robert, Jr., but provides no factual details about this analysis. He fails to even mention or discuss the only object which anyone saw near the victim's head, the metal window support which Porter observed.

In his second supplemental affidavit, Miller discusses the exemplar vehicles. Starting with a picture of a Chevrolet pickup truck with a snowplow frame attached, situated behind a Ford Tempo, Miller drew a line representing where the snowplow would end up if it proceeded directly into the Tempo. Miller concludes that "it is apparent as an observable fact, that the lift mechanism attached to the truck reached and invaded the right-rear seat at head height and would have struck the right rear passenger."

Miller provides no supporting data to establish that the exemplar vehicles were in the same positions relative to each other as the actual truck and Tempo had been at the time of the accident. Even assuming that the exemplar vehicles were correctly positioned, these pictures do not show what actually happened to the Tempo. The pictures of the exemplar vehicles show only that if the truck were to penetrate directly through the trunk of the car, in a straight line, then the front of the truck, including the plow mechanism, would end up in the rear passenger area. This establishes nothing more than that it is possible, given the relative height of the vehicles, that the plow caused injury. Miller provides no facts from which we can reach the conclusion that it is more probable than not that the plow frame tore directly, without any resistance, into the car in a linear fashion and reached the passenger's head.

2. Norris Shoemaker

Norris Shoemaker, a consultant in transportation safety, reviewed the same documents and pictures as Mr. Miller. In his initial affidavit, Shoemaker made general observations about the design of the snowplow, asserting that the defendant's product "changes the crush characteristics of the pickup truck and concentrates the energy of the collision in a narrow area projecting in front of the vehicle in a narrow spearlike configuration" and, as a result, the snowplow frame "can and has inflicted severe head and other injuries". This is not evidence of what actually happened in the accident with which we are concerned.

Although in his supplemental affidavit Shoemaker makes more specific assertions about the accident at hand, they are not sufficient to establish a causal connection. Shoemaker asserts that "a comparison of the exemplar vehicles and the damage photographs clearly show a penetration to and beyond the right rear passenger seat by the Defendant's product." However, without additional facts, a comparison of these two sets of photographs does not sustain such a conclusion. The exemplar pictures show only where the truck may have struck the Tempo, and the damage pictures are not sufficiently clear or detailed to show that the lift arm or other parts of the plow frame ever penetrated into the right rear passenger seat.

3. Gerald Feigin

Dr. Gerald Feigin, the medical examiner who performed the autopsy on the deceased, submitted an affidavit. Based on his experience, the autopsy report and pictures, and an examination of a Western lift arm, Feigin concluded that a blunt object shaped like a lift arm caused the fatal blow to Robert, Jr.

Feigin's affidavit was written four years after he performed the original autopsy. At the autopsy, Feigin noted a one centi-

meter contusion on the head. However, in his affidavit, he suggests that the bruise was in conformity with the size of the terminus of the lift arm, which is 2 inches by 3 1/2 inches. This creates a factual discrepancy as to the actual size of the bruise. In addition, as the district court pointed out, the pictures attached to the autopsy do little to support Feigin's conclusion. They do not clearly show a U-shaped bruise conforming to the reported size and shape of the lift arm. It is arguable that these concerns go to the weight of the evidence and the credibility of the witness, and would not themselves be a sufficient basis, on summary judgment, for disregarding the evidence. But even if we accept the conclusion that the bruise on the decedent was the same size and shape as an injury which would result if a "blunt object shaped like a Western lift arm" struck a human head, this does little to establish that, in this particular case, the lift arm actually did strike Robert Hayes, Jr.

4. Dr. Ommaya

Plaintiffs also attached the affidavit of Dr. Ayub Khan Ommaya, a neurosurgeon. Ommaya examined the police report, accident photographs, medical records, autopsy report, death certificate, witness depositions, and affidavits of the other experts. Based upon this evidence, he concluded that the fatal injury was caused by the snowplow lift mechanism because, among other unnamed reasons, "the deceased was seated in the path of the lift mechanism and [the] type and location of the bruising fits the penetration path of the lift mechanism". Ommaya added that there was no other source for the head injury and that his conclusion was inevitable from the dynamics of the accident, including the acceleration forces. Ommaya asserted that Robert, Jr. would have sustained minor injuries similar to those of the other passengers in the car if the lift mechanism was not present.

The difficulty with Dr. Ommaya's opinion is that he begins with one assumption, that the deceased was in the path of the lift mechanism; adds a further assumption, that there was no other object which could have caused the injury sustained by the deceased, and then concludes that the lift mechanism caused the injury. As we have seen, there are not sufficient facts to establish that the lift mechanism entered the compartment where Robert, Jr. was sitting, and Ommaya does not offer any additional facts. The assumption that there was no other source of injury disregards the presence of all other parts of the Tempo and the truck, in particular the piece of the car which Officer Porter testified he found lying against the boy's head. Ommaya fails to discuss the "dynamics of the accident" or the "acceleration forces", which he claims lend support to his conclusion.

Ommaya asserts that Robert, Jr. would have sustained minor injuries similar to those of the other passengers in the car if the lift mechanism was not present. It is clear from the police photographs that the primary damage to the Tempo was in the right rear area of the car. The driver of the truck testified that the right rear passenger area received the brunt of the collision. Regardless of the presence of the snowplow frame, therefore, it is likely that the passenger seated in that compartment would have been more severely injured than any of the other passengers.

V.

Conclusion

We hold that there is no genuine dispute of material fact as to whether the defendant's product was the proximate cause of the fatal injury to Robert Hayes, Jr. The evidence does not establish that it is more probable than not that the plow frame came into contact, directly or indirectly, with the victim. Given the available facts, the experts were able to provide no more than unsubstantiated conclusions. The district court correctly granted summary judgment. Affirmed.

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MEMORANDUM AND ORDER OF MAZZONE, D.J.
JUNE 5, 1992
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 91-10184-MA
consolidated with
CIVIL ACTION NO. 91-10294-N

ROBERT P. HAYES, ADMINISTRATOR
and as PARENT and NEXT FRIEND OF
ERIC HAYES,

Plaintiff

Vs.

DOUGLAS DYNAMICS, INC.,

Defendant

MEMORANDUM AND ORDER

Mazzone, D.J. June 5, 1992

Plaintiff Robert P. Hayes, as Administrator of the Estate of Robert P. Hayes, Jr. and as Parent and Next Friend of Eric Hayes, filed this diversity suit against Douglas Dynamics, Inc. for injuries sustained by his two minor sons in an automobile accident.[1] Plaintiff's allegations include defective design, a breach of warranty and negligence on the part of the snow plow manufacturer. Jurisdiction is pursuant to 28 U.S.C. § 1332.

Defendant Douglas Dynamics filed a third party complaint against Carol Wallace and Bruce Fletcher, the drivers of two

[1]The actions on behalf of Robert Hayes, Jr. and Eric Hayes were originally filed separately, then later consolidated in this action.

of the vehicles involved in this accident. Wallace and Fletcher have settled.[2]

This case is now before me on Defendant Douglas Dynamics' Motion for Summary Judgment under Fed. R. Civ. P. 56. Defendant argues that Plaintiff has not established that Douglas Dynamics' product proximately caused either the injuries of Eric Hayes or the death of Robert Hayes, Jr. Plaintiff filed a cross motion for Findings of Fact and Partial Summary Judgment on the Elements of the Plaintiff's Cause of Action.[3] I have carefully reviewed Plaintiff's extensive factual submissions, as well as the motions and other exhibits submitted by both parties, including the supplemental photographs and affidavits, and conclude Plaintiff has not set forth adequate evidence to establish that Defendant's product proximately caused the injuries sustained by the Hayes brothers. Therefore, the Defendant's motion for Summary Judgment is granted.

FACTUAL BACKGROUND

On January 30, 1988, the Hayes brothers were sitting in the rear seat of a Ford Tempo, Eric on the left and Robert on the right. The Tempo was stopped at a light, awaiting an opportunity to make a left hand turn. A Chevrolet pickup truck came from behind and struck the right rear area of the Tempo with the left front of the truck. The impact of the collision caused the Tempo to swerve into oncoming traffic and was struck again in the right front wheel area by a Chevrolet van. This second impact caused the Tempo to spin an additional 180 degrees before stopping.

The pickup truck had a Douglas Dynamics snow plow frame

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[2]Plaintiff had previously settled with the driver of the pickup truck.

[3]Defendant has requested its Motion for Summary Judgment on Proximate Cause be considered prior to Plaintiffs' motion as an affirmative decision on its motion would mandate dismissal of the entire action.

affixed to the front of the truck frame; the plow had been removed. For purposes of this motion, Douglas Dynamics does not dispute that they manufactured this snow plow and frame. Plaintiff alleges that this plow frame caused injuries to Robert Hayes by directly striking or hitting him on the head. The plow frame and/or lift apparatus allegedly "altered the dynamics" of the truck, making it "more aggressive and dangerous," causing Robert Jr.'s death. Eric Hayes also sustained injuries in this accident.[4]

As evidence for its assertions, Plaintiff offers photographs to show that the front of the truck, containing the lift mechanism,[5] impacted directly with the Tempo. Plaintiff alleges that the lift mechanism struck and bent the right rear seat where Robert Jr. was seated. Plaintiff also offers the report of Wolf Technical Services, Inc., an accident reconstruction consultant, which performed a photogrammetric analysis of the accident photographs. They determined the rear seat back moved forward approximately 11.5 inches on the left end and 24 inches on the right end. The rear bumper moved forward approximately 15 inches at the left end and at least 30 inches on the right end. However, no cause for the movement was discussed in their analysis. In addition, Plaintiff offers the testimony of Nicholas Miller, an accident reconstructionist and engineer, who states that the lift mechanism caused the Tempo's accumulated sheet metal to strike Robert Jr. on the head. He also stated that the lift arm created wedge marks on the trunk of the Tempo. Miller did not personally inspect the vehicles, but relied on the police reports, photographs, medical records, the autopsy report, the depositions of others, the death certificate and the vehicle's VIN numbers. He considered the affidavits of Plaintiff's other experts as well.

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[4]The driver of the Tempo, the front passenger and Eric Hayes, who was seated in the left rear seat, sustained only minor physical injuries.

[5]The lift mechanism is part of the plow frame.

Plaintiff offers the statement of Norris Shoemaker, also an accident reconstructionist and engineer, who stated the design of the plow frame "changes the crush characteristics of the pickup truck and concentrates the energy of the collision in a narrow area projecting in front of the vehicle in a narrow spearlike configuration." According to Shoemaker, the frame "can and has inflicted severe head and other injuries."[6] Shoemaker's supplemental affidavit contains his review of the methods utilized by Nicholas Miller in reconstructing the accident, which Shoemaker states are standard. He states using exemplar vehicles to simulate the positioning of the vehicles and plow frame is common practice in accident reconstruction. He states that comparison of the exemplar vehicles and the photographs "clearly shows a penetration to and beyond the right-rear passenger sear by the Defendant's product." He also states that both he and Miller searched the interior of the exemplar vehicles for other possible agents of Robert Jr.'s injury and found none. He points out that Eric received no serious permanent injury although he was also exposed to the force of the collision.

Plaintiff also submits the autopsy photos and report which "clearly show" a U-shaped bruise at the right rear of Robert Jr.'s head. While the hospital and medical records indicate there was no apparent injury (no blood, no abrasions) to Robert Jr. except for a small abrasion on his knee, the medical examiner, Dr. Gerald Feigin, found a U-shaped bruise on Robert Jr.'s brain after he pulled back the skin. Plaintiff alleges that the lift channel-hydraulic unit ends with a similar configuration and cites Feigin's report, which states "with reasonable medical certainty" that Robert Jr.'s head "contained a bruise of the size and shape that would result when the leading nose

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[6]This was taken from the more complete statement submitted by Plaintiff, not the short opinion appended to Defendant's papers.

of a Western liftarm impacts a human head" and that this resulted in his death.

Dr. A. K. Ommaya, a neurological surgeon, also reviewed the medical records, autopsy, police report, photographs of the accident and of the vehicles at issue, the depositions of Officers Paul Porter and William O'Neil and the Wolf Technical Services report. Ommaya concluded that Robert Jr. died from a severe brain injury caused by "an impact to the region of the occiput" and that the mechanism of this injury was "directly related to the rear-end impact of the Chevrolet pick-up carrying the snow plow lift mechanism which acted as an intrusive object, focusing the energy of the impact directly in the region of the rear aspect of the victim's head."

In his deposition, Sergeant Paul Porter, the accident investigator, stated that when he came upon the accident scene, (he arrived prior to the fire department) he found Robert Jr. sitting, bent over diagonally towards the driver's seat, with the Tempo's right pillar (which is located between the back window and the small triangular window on the passenger's side) leaning against his head, specifically, against the right rear of his ear. He noticed *no protrusions* through the rear seat of the car, nor did he see any abrasions on Robert Jr. In inspecting the accident scene, Porter found that the front of the truck, with emphasis on the *left front* quarter, *to the left of the plow frame* proper, collided with the rear of the Tempo, with emphasis on the right rear.

Plaintiff also had other experts, such as Shoemaker, who submitted a report relevant to the design defect aspects of the case.

DISCUSSION

Douglas Dynamics moves for summary judgment, charging that Hayes is unable to show the injuries sustained by his sons

were proximately caused by the snow plow apparatus.

> Rule 56 does not invite a court to enter the realm of surmise. Evidence that is based on conjecture or farfetched supposition is not sufficient to derail the operation of the rule. ...[S]ummary judgment may be warranted "if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."

Local 48 v, United Brotherhood of Carpenters and Joiners of America, 920 F.2d 1047, 1051 (1st Cir. 1990) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). While there is no question the pickup truck with a snow plow frame collided into the rear of the Tempo, the evidence is not sufficient to form the necessary causal relationship linking the plow frame specifically to the particular injuries.

Plaintiff has several experts: Wolf Technical Services; Miller and Shoemaker, the accident reconstructionists; Feigin, the medical examiner; and Ommaya, the neurological surgeon.

> [A]n opinion given by an expert will be disregarded where it amounts to no more than mere speculation or a guess from subordinate facts that do not give adequate support to the conclusion reached.

Carey v. General Motors Corp., 377 Mass. 736, 741 (1979). The facts must support the expert's theory. *Id.* Wolf Technical Services, which analyzed the photographs, made no statement of any kind as to *how* the damage occurred. Therefore, the Wolf report offers no support for Plaintiff's theory that the plow frame caused the injuries.

Nicholas Miller did not examine the vehicles themselves. The photographs do not provide the detail concerning the plow frame's contact with the Tempo. Since Miller's reconstruction

lacks direct evidence of the contact, his testimony, along with that of the medical experts, becomes the only avenue to show a causal relationship. *See Swartz v. General Motors*, 375 Mass. 628, 632 J(1978); *Noble v. Goodyear Tire and Rubber Company*, No. 88-7389 slip op. at 15 (Middlesex Superior Ct. July 3, 1991).

Miller states that the penetration occurred because the front end of the truck containing the lift arm struck the rear of the Tempo.

> The lift arm (channel)-hydraulic unit focuses the energy of the pickup truck on a small area of any vehicle or person with which it collides. The result is ***much greater*** penetration than would result with no lift mechanism installed. In addition, the lift channel-hydraulic unit *can* strike at occupant head and body level.

Miller Affidavit (emphasis added). Miller concludes that if the snow plow had not been present, Robert Jr.'s injuries would have been "equal to or less than Eric Hayes." However, his statement is more hypothetically than factually based. He states the lift channel "can" strike at head level and that the penetration can be "much greater." Neither of these statements concretely establish that Robert Jr.'s head was struck by the lift arm. Porter stated the area to the left of the plow frame impacted with the right rear of the Tempo. This testimony suggests it is possible the plow frame missed the truck. Miller asserts that the lift mechanism struck the trunk lid, leaving marks, and that the mechanism was damaged in the collision. These assertions are based solely on photographs, which I have reviewed. Miller did not have an opportunity to inspect the vehicles. There is no mention of this damage in the police reports or deposition of witnesses. Porter stated in his deposition that no blood or hair was on the

frame, and that he does not believe there were paint particles from the Tempo on the lift apparatus, but he cannot specifically recall. Officer Thistle, another accident investigator, recalled there was damage to the plow frame, but could not recall specifically what was damaged. Furthermore, Miller states "the subsequent movement of the vehicles and collision with the van are not relevant to *any* injury." (emphasis added). His supplemental affidavit attempts to explain this by stating that the second collision involved a "side collision near the front, with no component forcing Robert Hayes Jr. to the rear." However, the vehicle also spun 180 degrees before stopping. This aspect is not discussed.

Shoemaker's supplemental affidavit states that "penetration *to and beyond*" the right rear passenger seat by the plow frame is clearly shown by the photographs and the exemplar vehicles. However, the photographs of the exemplar vehicles appear to show the truck *directly behind* the Tempo, when the truck should have been behind but to the right of the Tempo. (Recall that the left front of the truck struck the right rear of the Tempo.) Even if the vehicles are properly positioned, the photographs do not "clearly show" this penetration; the viewer is required to make assumptions about the nature of the contact. Shoemaker states that Eric (seated in the left rear) received no serious permanent injuries "although he was also exposed to the force of the collision." However, as is obvious from the witness statements and the pictures, the right rear of the car where Robert Jr. was seated received the brunt of the impact, therefore the force was necessarily greater on the right side of the car, regardless of the snow plow frame. Shoemaker states there was nothing in the rear interior of the Tempo to cause a severe head injury, but does not discuss the impact the pillar alone might have made on Robert Jr.'s head. On a similar note, Miller's supplemental affidavit states "there would have been no head injury" to Robert Jr. if the

lift mechanism had been removed as no part of the truck would have struct Robert Jr.'s head. Again, the impact was greater on the right side of the car. Certainly these theories are *possible*, but given the evidence taken as a whole, they do not seem *probable*.

As previously mentioned, the facts suggest there are other ways in which Robert Jr. may have sustained his injuries. The car was hit twice and spun around before coming to a stop. The right rear quarter of the car was heavily damaged across an area much wider than what the impact of the plow frame could cause alone. Also, Sergeant Porter stated he found Robert Jr. with the right rear of his head against the right pillar of the car, the same general area of the brain bruise. Robert Jr. was not wearing a seatbelt and may well have been thrown around the interior of the car during the first and second impact. His head could have collided with other objects or parts of the car.

> There is no requirement of law that the plaintiff point out the exact way an accident happens. The plaintiff sustain[s] her burden if she prove[s] that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.

Carey v. General Motors Corp., 377 Mass. 736, 740 (quoting *McLaughlin v. Berstein*, 352 Mass. 624, 627 (1967)). While the theory presented by Miller may be a *possible* theory, there appear to be other possibilities as well. Miller has not shown that Plaintiff's theory is the *probable* cause of the accident.

Shoemaker's other statements speak generally to the plow frame design and how it alters certain "crush characteristics" of the truck. He does not speak to the specifics of this accident. His comments are more geared to the design defect

aspects of the case. Therefore, his testimony is not helpful in establishing the causal link.

The medical experts offer that the bruise occurred when Robert Jr. had contact with a blunt object and that the shape of the bruise appears to correspond with a part of the lift frame. The problem with their statements is that they *assume* contact with the liftarm occurred. Ommaya states the findings in the autopsy report and the medical examiner's affidavit

> clearly show with reasonable medical certainty and probability that a blow from a blunt object was received at the right rear of the deceased head causing bruising under the scalp and on the brain. This blow caused the other resulting brain injuries and death. In my opinion the aforesaid blow and the resultant death was caused by the snowplow lift mechanism .... There is no other source for such injury to the right rear of the head.

However, impact with the right pillar alone is not even mentioned,[7] even though he states he reviewed the Porter deposition. This raises the question as to whether Ommaya was fully aware of the contents of the deposition and therefore of such a possibility.[8]

The photographs of the accident which Plaintiff offers are all taken at a distance. There are no photographs which show

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[7]Neither party mentioned Porter's testimony in their briefs, although it was included in the exhibits.

[8]*Swartz v. General Motors Corp* ., 375 Mass. 628 (1978) involved claims for defective design of an automobile, specifically, problems with a detent switch. No direct evidence of the position of the switch was offered. The expert offered testimony based on a laboratory experiment with a similiar switch. The judge ruled the testimony was insufficient because he had not tested the amount of force necessary to move the switch when showed a "possibility rather than a probability of improper design" and therefore a plaintiff's verdict would "rest on speculation." *Id.* at 632.

the lift arm penetrated into the sheet metal which Plaintiff alleges. The officers and rescue workers at the scene did not observe any protrusions through the rear seat of the car, nor do they recall seeing any marks on Robert Jr. (except for a small abrasion on the knee). The photograph of the truck with the plow frame which Plaintiff offers to show that the lift channel-hydraulic unit ends in a configuration matching the brain bruise is also taken from a distance. I have reviewed this and the photograph does not clearly show such similarity. Finally, the testimony of the officer inspecting the scene raises the possibility that the plow frame, or the bulk of it, may have missed the right rear bumper of the Tempo.

The issue a jury would be asked to decide is whether the plow frame attached to the truck

> directly and in natural and continuous sequence produce[d] or contribute[d] substantially to the injury, so that it can be said that, except for the defective [plow frame], the injury complained of would not have occurred.

Devitt, Blackmar and Wolff, 3 *Federal Jury Practice and Instructions*, § 82.04. In considering a motion for summary judgment, the inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may *reasonably* be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (emphasis added). After careful review of the evidence, I do not believe a jury could *reasonably* resolve the facts in Plaintiff's favor. Without direct evidence of the snow plow frame's role in this accident, and without statements from experts more solidly grounded in factual observations, a jury verdict for Hayes would be based on speculation. "A verdict may not be based on conjecture and surmise, and expert opinion does not help if it is demonstrated that it rests on speculation." *Swartz v. General Motors Corp.*, 375 Mass. 628,

633 (1978). Since there is no sufficient evidence to establish proximate cause for Robert Jr., the same is true for Eric, who sustained even less physical injury.

CONCLUSION

For the aforementioned reasons, Defendant's Motion for Summary Judgment is granted. Therefore, the matter is dismissed.

SO ORDERED.

s/s A. David Mazzone

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2374
93-1033

Received
DEC 20 1993

MARY HAYES ADMINISTRATOR OF THE ESTATE OF ROBERT HAYES JR. AND ERIC HAYES,
Plaintiff, Appellant,

v.

DOUGLAS DYNAMICS, INC.,
Defendant, Appellee.

Before

BREYER, *Chief Judge,*
TORRUELLA, SELYA, CYR, BOUDIN, STAHL,
CircuitJudges and
FUSTE,* *District Judge.*

ORDER OF COURT

Entered: December 17, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Illegible
Clerk.

*Of the District of Puerto Rico, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RECEIVED
DEC 23, 1993

No. 92-2374
No. 93-1033

MARY HAYES, ADMINISTRATOR OF THE ESTATE OF ROBERT HAYES, JR. AND ERIC HAYES,
Plaintiff, Appellant,

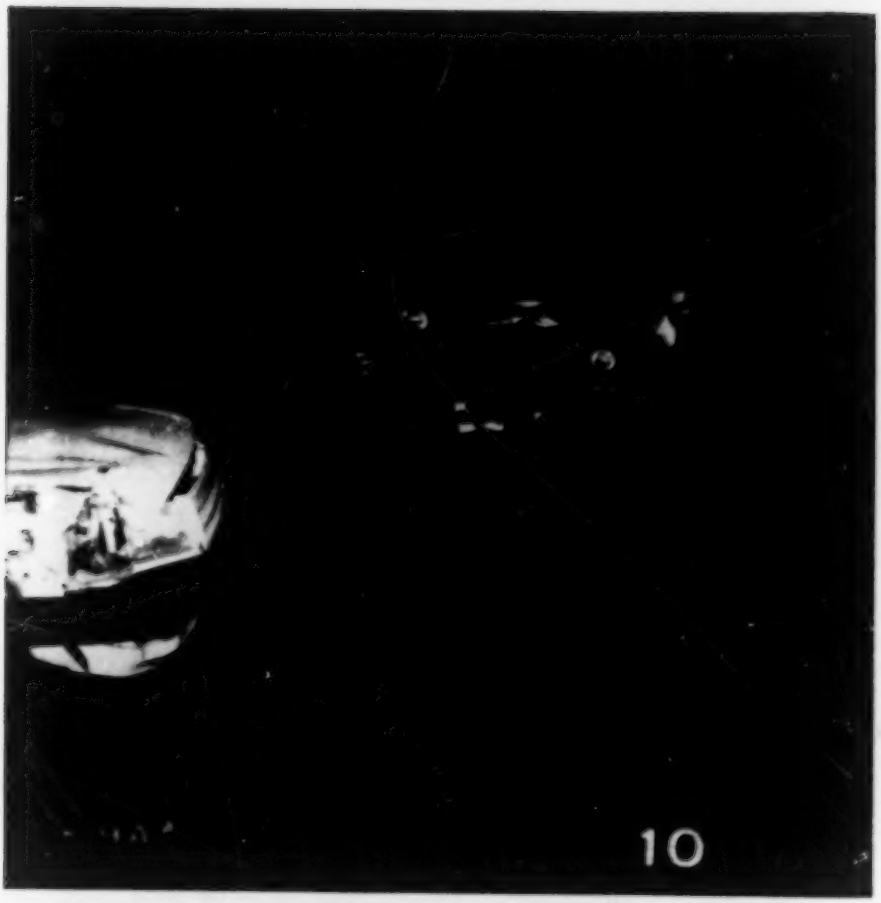
v.

DOUGLAS DYNAMICS, INC.,
Defendant, Appellee.

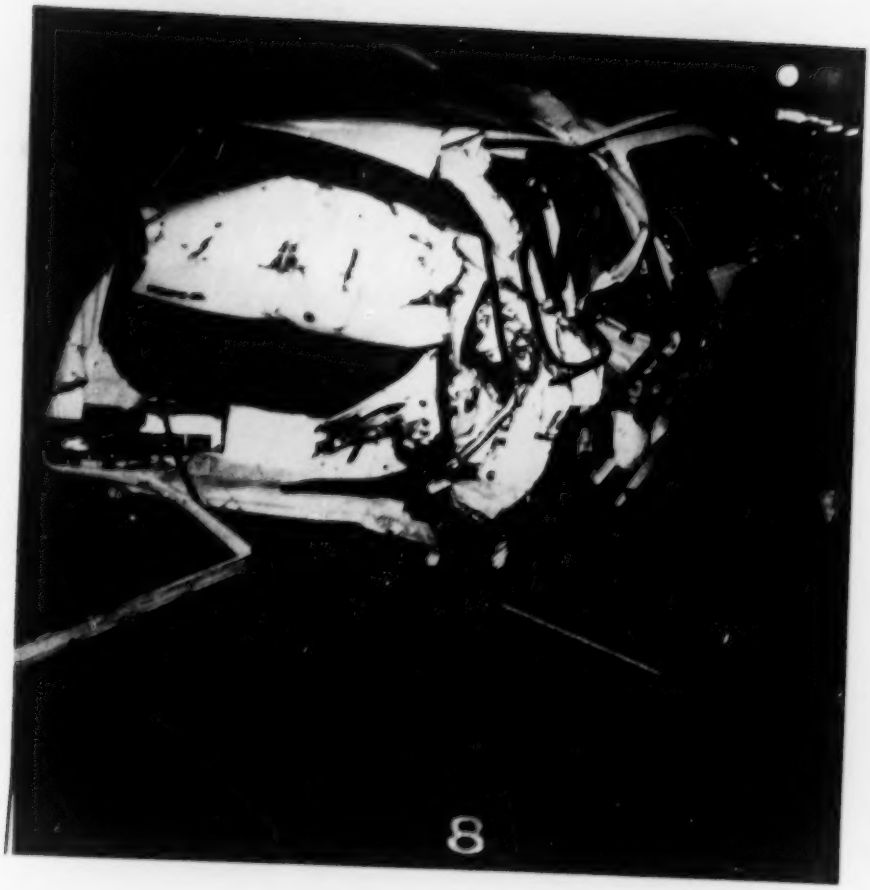
ERRATA SHEET

The opinion issued November 1, 1993, should be corrected as follows:

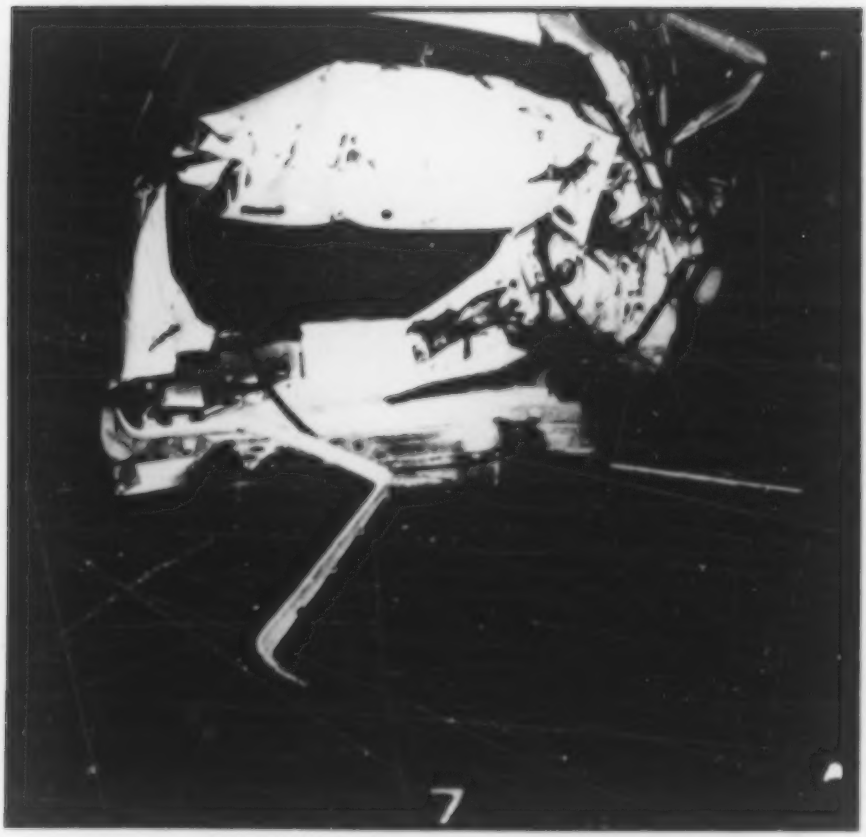
> P. 10, 1. 3 reads in part: "underlying facts or data, is inapposite. This rule was designed"; it should read in that pertinent part: "underlying facts or data, is largely inapposite. This rule was primarily designed". The corrected sentences will read: "Plaintiff's reliance on Federal Rule of Evidence 705, which allows an expert to give opinion testimony, together with the supporting reasons, without disclosure of the underlying facts or data, is largely inapposite. This rule was primarily designed to apply in the context of a trial, where cross-examination provides an opportunity to probe the expert's underlying facts and data and to test the conclusions reached by the expert."



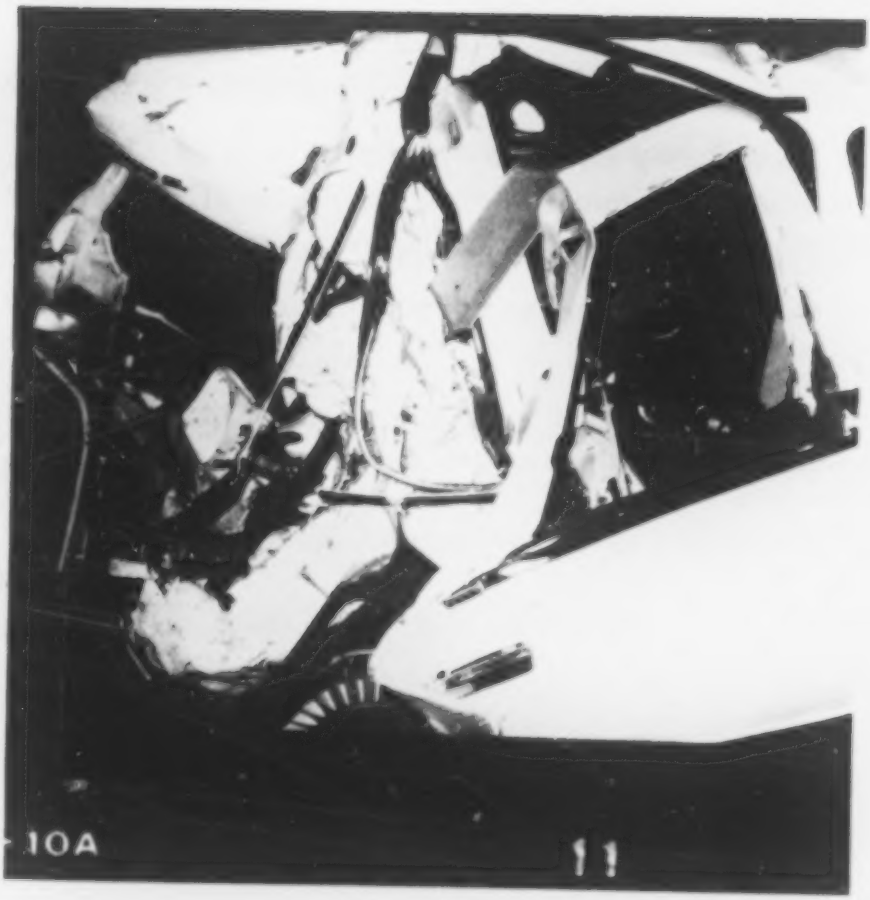
Front of Truck



Rear of Ford Tempo



Rear of Ford Tempo



Right Rear Quarter Panel of Ford Tempo

ADDENDUM

(R-319)

THE GRAND JURY TESTIMONY OF PAUL PORTER

I show you this picture. Could you identify that please?

Answer: Yes that shows the front end of the Chevrolet pickup that was owned by Mr. Richardson and Driven By Mr. Richardson. There is a plow frame on the front.

Question: Is it the plow frame that went into the back of the victim's car?

Answer: The right rear quarter panel of the victim's car where Robert Hayes was sitting.

* * * * *

Excerpts from the October 4, 1991, deposition of William Richardson, driver of the pickup truck.

Q. Do you rember at what point your pickup truck first contacted the white Ford?

A. I came in contact with the Ford off center because I was swerving in an attempt to avoid it.

Q. Do you remember on the rear of the vehicle where that point would be?

A. The rear passenger side.

Q. What part of your truck contacted the rear passenger side first, if you know?

A. Approximately the center of my truck hit the passenger side of the car.

(Taken from record page 451a)

* * * *

Q. Directing your attention to that piece, was that on your vehicle at the time of the accident; that is, that lift channel? Was there a lift channel there?

A. Yes. You can even see it in the very poor copy of the picture.

Q. Directing your attention to that lift channel and directing your attention to the point of impact, can you tell us what part of the Ford vehicle, if any, that lift channel impacted on?

A. The passenger side in the rear.

Q. And would that lift channel have been to the left or the right or on the center line of the rear of the Ford?

A. It would have been to the right side, the passenger side.

Q. Were you able to see the actual impact of that lift channel on the Ford vehicle as the crash occurred?

A. No.

(Taken from record page 455a)

Excerpts from the August 16, 1991, deposition of Alan Royer, of Randolph Fire Department.

Q. You don't know how much time elapsed from the time of the accident and the time you got there?

A. About three minutes

(Taken from record page 337a)

* * * * *

Q. Okay. Now, going back to January 30th, 1988, where was Robert Hayes Junior when you have first saw him that night?

A. He was in the back seat of the car.

And where in referernce to the car was Robert Hayes, Junior's head?

A. He was like sitting up in the back seat.

Q. Was there anything when you first arrived there touching his head or on his head?

A. Not that I can remember.

* * * * *

QUOTE FROM THE AUTOPSY REPORT OF ROBERT HAYES DONE BY GERALD FEIGIN, Pg. 2

There appears to be a palpable contusion over the occiput that is large and will be described more fully in a later section.

EXCERPTS FROM THE AFFIDAVITS OF NICHOLAS MILLER

. . . . . .

I serve on the SAE Committee Truck and Bus Crashworthiness sub Committee. I have testified as to products and accidents in over 20 jurisdictions. I have reconstructed other accidents involving snowplow lift mechanisms involving the snowplow lift mechanisms including those involving the Western snowplow lift and their effect on passengers and vehicles. . . . . .

I have performed a reconstruction of the accident involved in this proceeding. In doing so I have used generally accepted and relied upon scientific principles and methods. The materials supplied were sufficient for this work. . . . . I obtained two vehicles of the same dimensions similarly equipped and placed them in the position indicated by damage shown in the scene pictures. . . . . .

My reconstruction is as follows: . . . . . .

The whole rear of the Tempo was impacted except the far left side. The centerline of the truck was behind the right rear passenger seat. . . . . .

The truck crushed the rear of the Ford Tempo until the lift mechanism reached the rear seat area where it struck and deformed that right rear seat and drove the right rear portion of that seat forward approximately 24 " and struck the right rear passenger on the head through the sheetmetal accumulated during the collision.

In the course of the accident the lift mechanism struck the trunk lid leaving a wedge shaped mark and other marks on the lid. The lift mechanism was damaged in the collision. . . .

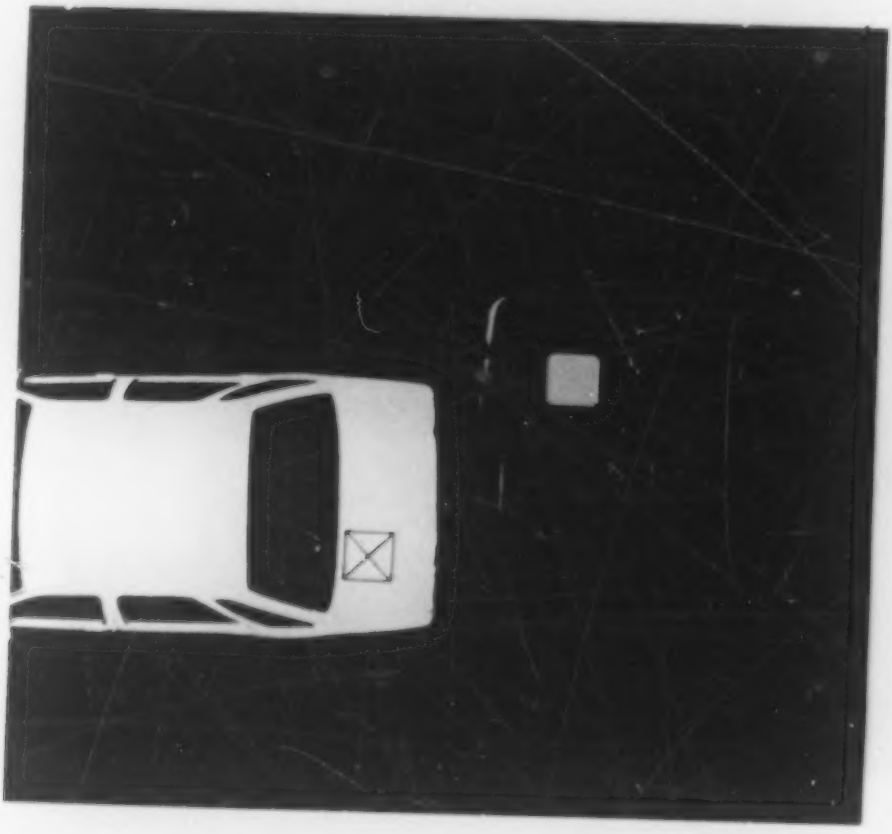
The shape of the lift mechanism is apparent in the police photographs of the Ford Tempo. The presence of the lift

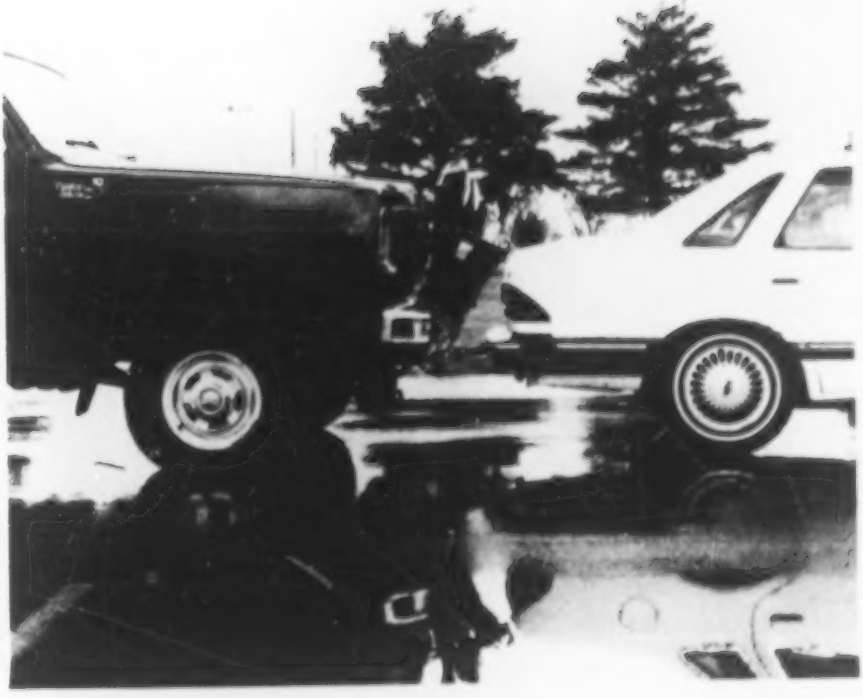
mechanism can be located in the damage. . . . . It is apparent as an observable fact that the lift mechanism attached to the truck reached and invaded the right rear seat at head height and would have struck the right rear passenger.

The lift mechanism was a head height and directly on a line to the right rear passenger seat area. I am able to determine this from the examination and measurements of the exemplar vehicles and the materials listed in my affadavit.

In conclusion, my opinion was and remains that based upon the observable facts, that the lift-mechanism entered into the rear-passenger seat at a location and height to have caused the right rear passenger to have been in the rear of the head at a time when he was moving ot the rear in reaction to the collision. In the event the lift mechanism were removed. . . .

EXEMPLAR PICTURES OF NICHOLAS MILLER





side

SUPPLEMENTAL SUBMISSIONS

AFFIDAVIT OF PAUL PORTER, WITH ATTACHMENTS, ATTACHED TO FOREGOING PLAINTIFFS' MOTIONS (Pages 913a-918a).

Paul Porter being duly sworn deposes and states as follows:

1. I was the supervising officer at the accident scene where Robert Hayes was killed. I am not an accident reconstructionist.

2. Attached hereto is my sketch which is a fair and accurate representation of the damage to the Tempo as I saw it. Robert Hayes was seated in the circled area.

3. At the scene I had not time or ability as an investigator to look for bruises on the deceased. I am not an accident reconstructionist but an accident investigator who collects facts and information at the scene. I am not qualified to express an expert opinion based on said facts.

4. My statement to the Grand Jury was accurate and true.

5. I had not time at the scene or later to specifically measure and compare the damage between the vehicles or find evidence for the role of the snowplow in the accident.

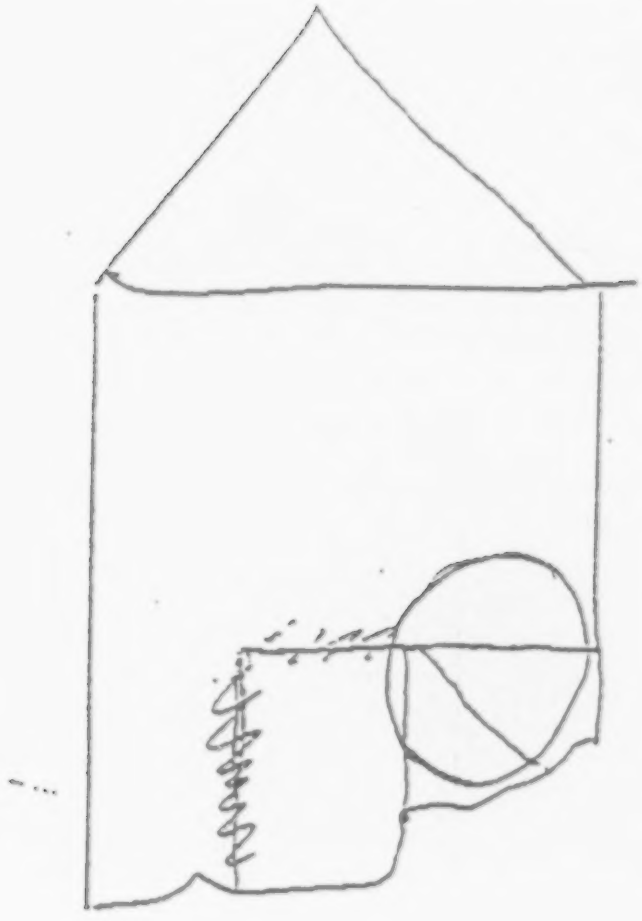
6. The attached sketch is an official department document.

7. The Damage was over almost all of the rear of the Tempo.

Signed to under the pains and penalties of perjury.

s/s Paul Porter

Paul Porter



NOT OFFICIAL POLICE DOCUMENT

DATE 6/15/92
Det/Sgt Paul Porter

AFFIDAVITS OF NORRIS SHOEMAKER, ATTACHED TO FOREGOING PLAINTIFFS' MOTIONS (Pages 919a-921a).

Norris Shoemaker being duly sworn deposes and states as follows:

1. One of the dangerous aspects of plow frames is that they suffer little if any damage in collisions with automobils because of their rigidity and strength.

2. In this case the pictures show the broken hydraulic hanging in front of the bumper of the Richardson truck from the liftarm.

3. The lift mechanism creates a zone of danger starting at the nose of the liftarm and going to the grill of the truck.

4. Robert Hayes was seated in the area where he was fatally injured by the lift mechanism and the metal it deformed.

5. Without the lift mechanism the truck and the metal it deformed would not have caused his fatal injuries because the penetration is reduced by approximately the amount the liftarm protrudes in front of the grill.

6. The plaintiffs case is about unnesscessary dangerous passenger compartment penetration which deformed the rear structure of the Tempo into Robert Hayes including the C-pillar.

7. The final rest position of the occupants is the result of the final rest position of the vehicles and has nothing to do with the fatal blow.

8. The second collision was of a minor nature and did not contribute to this fatal injuries because of the low impact forces involved therein based on the damage to the Tempo and Wallace Van.

Sworn to under the pains and penalties of perjury.

s/s Norris Shoemaker

Norris Shoemaker

Norris Shoemaker being duly sworn deposes and states as follows:

1. The lift mechanism is so rigid compared to the front of the truck that it is the dominant structure that caused the crush of the Tempo.

2. If the lift mechanism had missed the Tempo extensive damage to the left front of the truck would be expected.

3. This damage did not occur because the front left corner of the truck above the bumper of the truck has no significant damage.

4. If the lift mechanism had missed the Tempo, the fender, hood, grill, lights and that section of the bumper of the truck would be extensively deformed. As noted in the photographs not even the left headlight lens of the truck was broken.

5. The rear deformation of the Tempo does not correlate with the damage shown on the pickup truck if the lift mechanism had not impacted the rear of the Tempo.

6. The pictures show where that the liftarm and the plow and the hydraulic contact the truck.

Sworn to under the pains and penalties of perjury.

s/s Norris Shoemaker

Norris Shoemaker

Norris Shoemaker being duly sworn deposes and states as follows:

1. I have done research on seatbelts for thirty years.

2. The seatbelt on the rear of the Tempo was a lapbelt.

3. In a rear impact a lap belt provides no effective restraint to reduce injuries in a rear impact because the seatback is restraining the occupant in the backward movement and not the lapbelt. So the presence or absence of lapbelt seatbelt was not a factor in preventing serious injury in this case.

Sworn to under the pains and penalties of perjury.

s/s Norris Shoemaker

Norris Shoemaker

SECOND SUPPLEMENTAL AFFIDAVIT OF NICHOLAS A. MILLER, P.E., ATTACHED TO FOREGOING PLAINTIFFS' MOTIONS (Pages 925a-927a).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 91-10184-MA

ROBERT P. HAYES, ADMINISTRATOR,
Plaintiff,

v.

DOUGLAS DYNAMICS, INC. ET AL

v.

CAROL WALLACE ET AL,
Third-party

SECOND SUPPLEMETAL AFFIDAVIT OF NICHOLAS A. MILLER

Nicholas A. Miller, P.E. being duly sworn deposes and states as follows:

I have reconstructed a number of accidents involving snowplows and their lifts, and I am familiar with their imprints.

The pictures in the Hayes accident show the following which could be seen by a skilled expert but may not be apparent to a layman:

a. The damage is less on the left side of the Tempo and increases to the right side.

b. The left side of the rear bumper of the Tempo is moved forward 15 inches based on the photogrammatical report. (This means that the left side of the truck hit the left side of the Tempo. This can be seen in the pictures and located.) This impact moved the seat where Eric Hayes was seated foreword 11 inches.

c. The point of impact of the lift mechanism is shown on the truck lid by a large V from the lift arm. Below and slightly to the right is a large gouge made by the hydraulic when it impacted above the bumper.

d. The line of the truck bumper on the Tempo is visible in these pictues from left to right and, the damage to the Tempo goes above and beyond the bumper contact. This can only be caused by a device that protrudes above and in front of the bumper, and the only thing above and in front of the trunk is the lift mechanism.

• When the damage on the left side of the Tempo is corroborated with the left side of the truck, the gouge and V line up with the lift mechanism.

• There is no part of the truck except the lift mechanism which could have caused the V and the related gouge in the Tempo.

• This V and gouge is also at the point of impact labeled in the police sketch which is logical since the plow protrudes in front of the truck and would hit first.

• Robert Hayes was directly in front of the gouge and the lift mechanism was propelled into the passenger compartment of the Tempo during the collision. The liftarm covered with sheet metal, accumulated during the collision, collided with Robert Hayes in the rear of the head as he was propelled to the rear by the force of the Tempo being accelerated by the truck. It was this collision that caused the death of Robert Hayes.

• This collision had more force applied to the head of Robert Hayes than any other in the accident.

• The lift mechanism suffered damage in the accident in that the scene pictures show the hydraulic was broken at its base and hanging below the bumper of the truck.

• One of the dangerous aspects of snowplow frames is that they suffer little if any damage in collisions with automobiles because of their protruding rigidity and strength.

• Robert Hayes death in this case was the result of the lift mechanism penetrating into the passenger compartment. All of the passengers were exposed to the same forces of acceleration during the collision. None received serious injury except Robert who was seated directly in the path of and was struck by the lift mechanism covered with the sheet metal.

• The lift mechanism created a zone of danger starting at the nose of the lift and going to the hood/grill.

• Robert Hayes was seated such that he was killed by the lift mechanism and the metal it deformed. He would not have been killed by the truck without the lift mechanism.

• The lift mechanism also deformed the right C pillar and pushed it out to the right away from Robert Hayes. The possibility of Robert Hayes hitting the C pillar was considered but rejected as a cause of death because the lift mechanism penetrated beyond the C pillar into where Robert Hayes was seated and because no force was present to drive Robert Hayes head toward the C pillar or the C pillar toward him.

• The bumper of the truck stopped at 10:00 position on the Tempo rear wheel. The imprint of the bumper and lower lift frame are visible at this place. In front and above this is evidence of the lift mechanism which penetrated the passenger compartment at head height where Robert Hayes was seated.

This is about the position shown in the red line drawing in my prior affidavit overlaying the pickup front on the Tempo.

Accordingly, the damage above and in front of 10:00 on the wheel in the rear quarter panel is attributable to the plow lift and frame.

The attached print has the unique damage areas caused by the snowplow lift frame circled.

Sworn to under the pains and penalties of perjury.

s/s Nicholas A. Miller, P.E.

Nicholas A. Miller, P.E.

AFFIDAVIT OF GERALD FEIGIN, WITH ATTACHMENTS, ATTACHED TO FOREGOING PLAINTIFFS' MOTIONS (Pages 909a-913a).

1. My name is Gerald Feigin. As a medical examiner I have testified over 100 times, probably closer to 200.

2. I did not make an assumption that the Western lift arm struck Robert Hayes, Jr. I based my opinion on what I saw at the autopsy and my actual visual inspection of a Western Lift arm. I do not assume instumentalities and/or mechanisms of death and then prepare opinions.

3. The bruise at the right occiput area of Robert Hayes, Jr's scalp at autopsy was not caused by a car pillar. The bruise had two distinct contusions, and the car pillar would have produced only one contusion. The two distinct contusions are consistent with the lift arm.

Signed this 17th day of June, 1992 under the pains and penalties of perjury.

s/s Gerald Feigin

Gerald Feigin, M.D.

AFFIDAVITS OF DR. AYUB OMMAYA, ATTACHED TO FOREGOING PLAINTIFFS' MOTIONS (pages 922a-924a).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case no. 91-10184-MA
Consolidated with
Case no. 102-10294-N

ROBERT P. HAYES ADMINISTRATOR
Plaintiff

V.

DOUGLAS DYNAMICS INC. ET AL.
Defendant

V.

CAROL WALLACE ET AL
Third Party Defendant

Dr. Ayub Ommaya, being duly sworn, deposes and states as follows:

1. I am familiar with the manner in which bodies of vehicle occupants in automobile crashes are caused to move during and after such crashes by the forces engendered. I am also familiar with the causes of death or injury occurring in such crashes. I have conducted many years of studies and research into the forces involved in head injuries, and their role in specific causation of specific brain injuries.

2. The fact that the location of a crash victim's body part may be found resting on a part of a car after a crash does not mean that that part caused the fatality during the accident. The

causative mechanism has to be determined by a competent expert or experts who are knowledgeable about vehicle crashes after analysis of all the data, including the type of crash and the type of injuries that are found. It has to be shown by such investigations exactly how the occupants were injured as a result of penetration or distortion of the occupant compartment, as well as by the effects of impacts to the body parts within the compartment, unless, of course, the subject is ejected. In this case, the final resting position of the victim's head has no relevance to the cause of the bruise found on the head and the related fatality (see my prior opinion).

3. I have read the deposition of Paul Porter, and it in no way effects or changes my opinion of this case.

4. Rear end collisions at moderate to low speeds are generally less likely to cause death from head injury because the trunk and fender areas absorb a significant amount of the crash energy before the forces can reach the passenger compartment. This mechanism of energy absorption increases the time over which the energy is dissipated, thus allowing less energy to reach the occupants. Moreover, crash data on automobile collisions provide additional confirmatory evidence for the lesser significance of rear-end impacts as compared to frontal or side impacts.

5. Experimental studies have shown that to injure the brain without a direct blow to the head, for example in a severe whiplash to the head, approximately twice the amount of rotational acceleration of the head is required. Thus if Robert Hayes' head had not been directly struck during the rear impact, he could not have suffered a fatal head injury by the severe whiplash mechanism, or by an impact of his hed to the pillar at the end of the crash sequence. The reason for rejecting either of these two alternative mechanisms is that, first of all, *there is no evidence* of injury to the other occupant of the back seat.

who suffered an exactly equal amount of mechanical force by the whiplash mechanism, and showed no evidence of any brain damage. Secondly, there would be very little energy left at the end of the crash sequence which would cause any significant brain damage or even bruising to the head, e.g. as inferred by the final location of the patient's head at the end of the sequence.

6. Nobody else died or suffered a head injury of any significance in this particular crash from the acceleration and deceleration caused by the rear end impact of the truck to the vehicle in which Mr. Hayes was seated. Accordingly, the only available mechanism for the fatal injury sustained by Mr. Hayes was caused by the penetration of the lift mechanism into the region of the occupant compartment related to Robert's head. Impact to the head of Robert Hayes was, therefore, caused by this penetration, and could not have been caused simply by any head motion subsequent to the initial impact phase. Thus, the probability that Robert would have suffered a fatal head injury by severe whiplash mechanish, or by an impact of his head to the pillar at the end of the crash sequence is extremely low. It is therefore not a scientifically valid opinion to reject a high probability mechanisms as proposed above and support a low probability causal scenario.

7. The snowplow lift device in this particular case accentuates the severity of the impact by focusing and concentrating the energy of the impact at one location, thus penetrating the occupant compartment at the time of impact, when the entire momentum of the truck is behind the snowplow device. The mechanism proposed is fully supported by all the evidence in the record.

Sworn to under the pains and penalties of perjury.

s/s Dr. Ayub K. Ommaya, M.D.

Dr. Ayub K. Ommaya, M.D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case no. 91-10184-MA
Consolidated with
Case No. 102-10294-N

ROBERT P. HAYES ADMINISTRATOR
Plaintiff

v.

DOULAS DYNAMICS INC. ET AL.
Defendant

v.

CAROL WALLACE ET AL
Third Party Defendant

Dr. Ayub Khan Ommaya being duly sworn deposes and states as follows:

1. I have researched head trauma for over 25 years. I have consulted internationally with NATO, the United States of America and other countries regarding head trauma and have done significant research in the field. I am currently a practicing neurosurgeon. My resume is attached at Vol II ex. C.

2. The fact that a bruise was not found at Milton General Hospital does not mean that it was not present at the accident or the site of the trauma which killed Robert Hayes.

3. Very often hair can obscure such a bruise which then will appear in a CAT scan and an autopsy later.

4. In this case the bruise appeared in a CAT scan and in the autopsy report.

5. Any argument that there was some intervening causation between the accident and the death which caused the bruise is patently frivolous. The medical reports reflect the classic medical symptoms of a death due to a blow to the head from the time of the accident to the death of Robert Hayes.

Sworn to under pains and penalties of perjury.

s/s Dr. Ayub Khan Ommaya

Dr. Ayub Khan Ommaya

Excerpts from testimony of Gerard Murphy, Massachussetts State Police Accident Reconstructionist.

* * * * *

between the two of the vehicles. Is that point of impact?

A. No, that's the center of the damage area one lining up with the damage area of the other. Remember, before the 14G I guess it is, it referred to this D point. D is the center of the damaged area. So where that is on this picture, those two lined up one damage point to the other; that's all it is.

Q. That was generated by the computer based on the data you input?

A. Right. If that were not correct, if they weren't like that, they are going to respond differently and then how that affects the actual scene situation.

Q. Were you able to measure or did you at any time — strike that.

How did you estimate the width of the damage to the back of the Tempo?

Well, I didn't measure it. And it did not seem to encompass the entire, at least the contact area, the entire area was damaged, but as far as where it was contacted it seemed to represent approximately 80 percent of the rear. And remember, the CDC, the coding I put in, would also reflect that type of relationship.

So it gets to be an interpretational thing on my part as far as how much area of the rear of the vehicle is damaged and then based upon the marks how those damaged points would line up.

Q. So these are all generated from that CDC input?

A. Yes.

Q. And that CDC input has certain values, I think you said one of the values was up to 18 inches?

MR. ALPERT: Objection.

A. Up to 18 inches that I talked about was the width of the damaged area. Up to 18 inches would be in that code, would be a narrow profile. Anything beyond that would be a W or Y profile. And both of these vehicles have more than 18 inches of contact damage area. And that's why both of them are entered as a W.

Q. W goes from more than 18 to what?

A. The entire width of the vehicle.

MR. KERR: We'll stop here for lunch.

* * * * *

weight, the wheels that are locked up on the vehicle, whether or not the steering, the type of surface it's sliding over and it then solves the momentum picture.

It basically does a vector analysis based upon what you tell it, how fast they were going, where they will end up. Where EDCRASH solves it in reverse.

Q. In terms of the overlap of the vehicles at impact?

A. That's an input.

Q. Is that input on EDSMAC?

A. That's correct.

Q. What value did, if you remember, did you use for that or what measure?

A. Well, I believe the overlap was basiclly shown in one of those illustrations on the EDCRASH as far as how they are oriented. That's why I showed approximately 80 percent, 80 percent in terms of the overlap, you know, not the entire front and entire rear being involved.

Is it your understanding or is it your opinion from the photographs of the front of the truck approximately 80 percent of the front of the truck was involved?

MR. ALPERT: Objection.

A. 80 percent of the back of the Tempo. I don't believe it was that much of the truck. It was at least half the truck as best as I ask recollect.

Having said that, what value did you use when you inputted that value into EDSMAC?

A. Basically, the value of the picture that I originally entered into the EDCRASH as far as how they were oriented. Also, how they were illustrated on approximately Exhibit 13A, the hand drawing, roughly showing that type of overlap.

Q. How spcific on the EDSMAC when you're entering it, just for background, on the ECDCRASH you only have I think three different categories, wasn't it less than 18 inches?

A. No. That's just on the crush.

Q. That's what I'm talking about.

A. No. As far as the overlap, that's determined by the position that you enter for the position at impact X-position, position at impact-Y and heading angle vehicle one and

* * * * *

Supreme Court, U.S.
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No. 93-1455

In The

Supreme Court of the United States

October Term, 1993

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES,

Petitioners,

v.

DOUGLAS DYNAMICS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF RESPONDENT DOUGLAS DYNAMICS, INC. IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Does Rule 705 prohibit a court (in the context of a Summary Judgment motion) from screening and thereafter rejecting, pursuant to the standards of Rule 56, conclusory and factually unsupported opinions of the non-moving party's experts.

II. Was the District Court correct in awarding Summary Judgment to the Respondent upon a showing that the Petitioners' experts' opinions (on the issue of proximate cause) were devoid of any factual basis or process of reasoning to support their conclusory assertions without requesting further submissions by the Petitioners.

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No. 93-1455

In The

Supreme Court of the United States

October Term, 1993

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES,

Petitioners,

v.

DOUGLAS DYNAMICS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF RESPONDENT DOUGLAS DYNAMICS, INC. IN OPPOSITION

Respondent, Douglas Dynamics, Inc., respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of a decision of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

On January 30, 1988, an automobile accident involving three vehicles occurred on Route 28 in Randolph,

Massachusetts. One vehicle was a full size Chevrolet truck (hereinafter, the "truck") driven by William Richardson with an attached snow plow lift mechanism (hereinafter, the "lift mechanism") allegedly manufactured by the Respondent, (which fact the Respondent for purposes of its summary judgment motion did not dispute) minus the plow. One vehicle was a Ford Tempo (hereinafter the "Tempo") in which Eric Hayes was seated in the left rear and Robert Hayes, Jr. was seated in the right rear. The third vehicle involved in the accident was a full sized Chevrolet van (hereinafter the "van").

The Tempo was stopped on Route 28 in Randolph facing north, awaiting an opportunity to make a left hand turn. The truck approached in a northerly direction from behind the Tempo and struck the right rear bumper area of the Tempo with the left front bumper area of the truck. Sergeant Gerard Murphy, an accident reconstructionist with the Massachusetts State Police, did an analysis of the accident for the criminal case against the truck driver and determined that the speed of the truck at the point of impact was 41.2 miles per hour (App. 1). (Contrary to the implication in the Petitioners' petition, Sargeant Murphy did not attempt to analyze the role of the lift mechanism with regard to the accident or the injuries to Robert Hayes, Jr.)

The impact of the full size truck on the rear of the Tempo catapulted the Tempo in a leftward arc across the center line into the oncoming southbound traffic on Route 28 where the Tempo collided with the southbound van. During the second impact, the Tempo was struck in the area of the right front wheel by the van causing the Tempo to spin an additional 180 degrees in a counterclockwise direction before coming to rest (for a total of

approximately 270 degrees rotation of the Tempo). The Petitioners contend that the presence of the lift mechanism caused physical injuries to Robert Hayes, Jr. by either directly striking Robert Hayes, Jr. on his head or causing crumpled sheet metal of the Tempo to strike Robert Hayes, Jr. on his head resulting ultimately in his death and thereby causing psychological injuries to Eric Hayes. The Petitioners' counsel has never argued that Eric Hayes received any physical injuries because of the presence of the lift mechanism and thus the Respondent, in its motion for summary judgment, only addressed the issue of the proximate cause of the physical injuries received by Robert Hayes, Jr.

The Respondent's position from the filing of its summary judgment motion (on January 13, 1992) has always been that insufficient factual, observed or photographic data existed from which the Petitioners' experts could conclude without resorting to conjecture or speculation that the lift mechanism proximately caused the death of Robert Hayes, Jr.

A. None of the Accident Scene Witnesses Observed Either Signs of Head Bruising or Trauma or Any Damage to Any of the Vehicles Relating to the Role, if any, in the Accident of the Lift Mechanism.

Very shortly after the accident, Sargeant Paul Porter of the Randolph Police arrived on the scene and approached the vehicle to check on the four occupants. At that time, he observed a right rear roof pillar (a structural support from between the side rear window and the rear window) of the Tempo bent over pressing down on the

head of Robert Hayes, Jr., at the point behind his right ear where Sargeant Porter observed the only bruise on Robert Hayes, Jr.'s skull during the autopsy (App. 2-5). At his deposition, Officer Porter was asked whether he observed any particular damage to either the Tempo or the truck to indicate whether the lift mechanism had penetrated the passenger compartment of the Tempo or what role, if any, the lift mechanism played in the damage to the vehicles or the injury to Robert Hayes, Jr. Officer Porter admitted that he had not made any factual observations of the damage to either of the vehicles with regard to the lift mechanism. Officer Porter further admitted that he had seen no evidence when he examined the Tempo to indicate whether the lift mechanism entered the passenger compartment (App. 6).

The only other police officer who investigated the accident was Officer Charles Thistle who wrote an accident report for the Randolph Police Department. When questioned at his deposition, Officer Thistle also admitted that he had not seen any evidence, when he examined the Tempo, to indicate that the lift mechanism had entered the passenger compartment or that the lift mechanism had even impacted the back of the Tempo, let alone the head of Robert Hayes, Jr. Further, Officer Thistle made no observations with regard to any particular damage done to any part of the lift mechanism on the front of the truck (App. 7-8).

The truck driver, William Richardson, also did not make any relevant observations. He testified at his deposition that he couldn't see the impact of the lift mechanism on the Tempo because the lift mechanism did not extend above the hood of the truck and he made no

observations as to damage to the lift mechanism after the accident (App. 9-10).

Next on the scene were the Randolph Fire Department EMT's, William O'Neil and Alan Royer. Both O'Neil and Royer were deposed and both testified that they observed no cuts, bruises or blood on the head of Robert Hayes, Jr. when they examined him at the scene. Also, both individuals testified that they made no observations of the condition of any of the three vehicles involved in the accident while they were treating Robert Hayes, Jr.

Thus, none of the witnesses at the scene of the accident provided any factual observations for the Petitioners' experts to use in reaching their conclusions.

B. None of the Hospital Personnel Noted Any Observations of Head Trauma to Robert Hayes, Jr.

Shortly after the accident, Robert Hayes, Jr. was taken by ambulance to the Milton Medical Center, Milton, Massachusetts. The Milton Medical Center records indicate that there were no external signs of head or facial trauma to Robert Hayes, Jr. (App. 11, Lines 7-8 under "History and Medical Exam" Section of Emergency Room Record). Nor do the records from the Massachusetts General Hospital (to which Robert Hayes, Jr. was air-lifted), include any observations of external head trauma.

Thus, the Petitioners' experts have no accident scene witness observations of damage to the vehicles or medical personnel observations of head trauma or other relevant injury to Robert Hayes, Jr., during the two days following the accident while he was still alive, upon

which to base their opinions that the lift mechanism hit Robert Hayes, Jr. The only medical person to observe any evidence of even a contusion to the decedent's head was the doctor who performed the autopsy after numerous organs had been removed for transplants. The Petitioners' experts base their opinions on police photographs and such "facts" as: the Respondent's product is an "energy focusing device" which, because of that characteristic, "must" have caused the massive damage to the back of the Tempo and thus "must" have caused the lift mechanism to actually strike the head of Robert Hayes, Jr. or in the alternative, to cause crumpled sheet metal to strike the head of Robert Hayes, Jr. This, without any observations of any head trauma to Robert Hayes from the time of the accident until after his death, some two days later.

Tellingly, none of the Petitioners' experts mention any of the witnesses except for Sargeant Porter and then to summarily dismiss Sargeant Porter's observation of the roof pillar pressing against the head of Robert Hayes, Jr. in the area where the bruise was observed some two days later.

The only actually observed facts which only one of the Petitioners' experts notes are measurements made by a photographic analyst (Huett) that the rear bumper of the Tempo was pushed forward "approximately" 15 inches at the left end and "at least" 30 inches on the right end and that the rear seat back was moved forward "approximately" 11.5 inches on the left and "approximately" 24 inches on the right. The rest of the experts' "facts" consist of photographs of a truck and a Tempo placed next to each other where the experts speculate the

vehicles were in relationship to each other at the time of the accident. Those staged photographs depict experts' *conclusions*, not the factual *basis* for the conclusions.

SUMMARY OF ARGUMENT

Petitioners have, in essence, two objections to the decision of the First Circuit. The Petitioners allege that: 1) the court weighed the credibility of the Petitioners' experts' affidavits on deciding the motion for summary judgment brought by the Respondent; and 2) the court failed to provide the Petitioners with an adequate opportunity under Rule 705 to provide additional factual support for their experts' opinions prior to ruling on the Rule 56 motion.

This Court should deny the petition because the First Circuit did no more than fulfill its "gate-keeping" duties regarding expert testimony as described in this Court's decision in *Daubert vs. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786, 2794 (1993). The Petitioners also distort the First Circuit's ruling to support their claim that a conflict exists between the circuits on the two issues described above. However, the circumstances of this case are inapposite to the cases cited by the Petitioners. Also, all of the cases cited by Petitioners either pre-date the *Daubert* decision, or to the extent a conflict between the circuits did exist, the *Daubert* decision resolved it. Further, the First Circuit remained within the parameters set out in the *Daubert* opinion on the issue of evaluating the reliability of the proffered expert opinions. Contrary to the Petitioners' position, a trial judge is not required, in

the context of a Rule 56 motion, to accept any expert opinion, no matter how speculative, offered by the non-moving party.

The Petitioners' second claim of error is equally without merit. The District Court did not fail to afford the Petitioners an adequate opportunity to *supplement* their expert opinions (contained in the affidavits of those experts) and no conflict between the First Circuit's decision and other circuits on this issue exists. First, Rule 705 does not *require* a court to provide a further opportunity to a non-movant (in the context of a motion for summary judgment) to supplement expert affidavits with further facts. Secondly, the cases in which summary judgment was reversed and the non-movants given a second chance cited by the Petitioners for their interpretation of Rule 705 are easily distinguishable on their facts from this case (generally, on the issue of the extent of the opportunity that the non-moving parties had to respond to the moving parties' motions).

The Petitioners' position from the beginning has always begged the question and ignored Respondent's primary point: there were insufficient facts observed by witnesses or information contained in scene photographs from which to conclude, without speculation, that the path of the lift mechanism intersected with the path of the head of Robert Hayes, Jr. Instead, the Petitioners have always argued that their experts' qualifications are impeccable, that their experts "methodology" is accepted in the field of accident reconstruction and that therefore, their expert conclusions are valid. Like the emperor's tailors in the fairy tale, the Petitioners' experts claim great expertise, and that only the finest craftsmanship goes into their work. However, Petitioners' experts presented their "wares" before both the District

Court and the First Circuit, and, like the child in the crowd watching the parade in the fairy tale, the experts' affidavits were correctly found to be as transparent as the emperor's new clothes.

REASONS FOR DENYING THE WRIT

A. The District Court and the First Circuit Court of Appeals Properly Performed Their Screening Duties Concerning the Adequacy of the Petitioners' Experts' Opinions in the Context of a Rule 56 Motion.

The Petitioners twist Rule 705 and argue that any evaluation of expert opinions is forbidden. In that argument, the Petitioners ignore Rule 702 and the *Daubert* holding on the issue of evaluation of the sufficiency of expert opinion affidavits in the summary judgment context. Under the *Daubert* holding, the trial judge retains an important "gate keeping" ability and duty.

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.[7] Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.
>
> [7] THE CHIEF JUSTICE 'do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility,' . . .

Id. at 2794-2795 [brackets in original].

In explaining that gate-keeping obligation, this Court specifically affirmed that a trial court has the obligation to determine and assess the "scientific knowledge" on which experts may testify and that it must be "more than subjective belief or unsupported speculation" *Id.* at 2795.

As set forth above in the statement of the case, the Petitioners' experts refer to only general observations relating to the violent, double collision itself (such as the truck "struck" the rear of the Tempo and the Tempo was struck on the front left by the Chevrolet van). However, the experts do not have specific facts or observations about the accident such as the placement of the vehicles at points of impact; the angles of the vehicles at either impact; the overlap of the vehicles; how much of the truck came in contact with the Tempo; or the position of Roberts Hayes, Jr. at any time during the violent three car accident to form their opinions without relying on irrelevant generalities. The "facts" heralded by the experts include "the truck crushed the rear of the Tempo." (N. Miller, Petitioners' A. 39). "The lift mechanism was damaged in the collision . . . " (N. Miller, Petitioners' A. 39). Observations, such as the above, provide no basis for a conclusion that the lift mechanism struck Robert Hayes, Jr. The Petitioners' lead expert Nicholas Miller's most circular "fact" on which he bases his conclusions is simply a restatement of his conclusion: "It is apparent as an observable fact that the lift mechanism attached to the truck reached and invaded the right rear seat at head height and would have struck the right rear passenger". (Petitioners' Appendix at 40a). The Petitioners' appendix includes four photographs of a truck and a Tempo placed (presumably by Miller) next to each other as "proof" that

the lift mechanism struck the decedent, Robert Hayes, Jr. As the District Court stated, far from it being an "observable fact", such photographs depict merely a conjectural opinion.

The most glaring omission in all of the Petitioners' evidence was the lack of any depiction in a photograph of the "accumulated" sheet metal which the experts claim, in the alternative, protruded into the passenger area of the Tempo and struck Robert Hayes, Jr.

The District Court and the First Circuit properly reviewed the expert affidavits and correctly rejected them as speculation and conjecture and insufficient to pass the test on summary judgment. That review was not of the credibility of the experts as claimed by the Petitioners, but of the factual support for those opinions, a perfectly proper exercise of the "gate-keeping" duties described in the *Daubert* opinion. The Petitioners' experts' protestations of expertise and methodology are merely an attempt to mask the fact that their opinions are unsupported speculation.

B. Petitioners Were Given More Than Enough Opportunities to Provide a Factual Basis for Their Expert Opinions and When They Failed Utterly to do so, the District Court Appropriately Granted the Respondent Summary Judgment.

The Petitioners also argue that in derogation of Rule 705, they were denied an opportunity by the District Court to provide more facts in support of their expert opinions. The Petitioners claim that Rule 705 gives nonmovants, in the contents of a summary judgment motion,

the *right* to notice by the court of the inadequacy of their expert affidavits prior to the court ruling on the Rule 56 motion as well as the *right* to supplement their opposition with additional material thereafter. However, the Rule simply does not create such a right.[1] Further, decisions cited by the Petitioners do not stand for such an interpretation of that Rule. Regardless of the Petitioners' interpretations of Rule 705, unlike the complaining parties in the cases cited by the Petitioners, the Petitioners had repeated opportunities to supplement, elaborate and augment their materials in opposition to Respondents' motion and they took liberal advantage to do so during the 5 months between the filing of the motion for summary judgment and the District Court decision on the motion.

In the instant case, Petitioners had ample opportunity to provide all the facts at their disposal. After extensive discovery by both parties, the discovery deadline came on October 22, 1991 (some three months before the Respondent's motion for summary judgment was filed on January 13, 1992). Thus it cannot be said that the Petitioners were "railroaded" into summary judgment as they imply. Had there been additional discovery necessary, the Petitioners could have filed a motion under Rule 56(f). However, they never filed such a motion. The

---

[1] Rule 705 – The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (Jan. 2, 1975, P.L. 93-595, sec. 1, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987).

Respondent's position from the filing of its summary judgment motion has been that there are no available facts from which to conclude, without speculation, that the Respondent's lift mechanism caused the death of Robert Hayes, Jr. Contrary to the Petitioners' argument, the issue of insufficient facts to support expert opinions was first raised initially and repeatedly thereafter by the Respondent, *not* by the District Court out of thin air in its opinion.

During the period between January 13, 1992 and June 5, 1992, on which date the District Court issued its ruling, the Petitioners filed an avalanche of documentation beginning with their first response to Respondent's motion on February 12, 1992. On that date, the plaintiff filed an opposition affidavit of Petitioners' counsel along with a cross motion for summary judgment, and a motion requesting findings of fact accompanied by a two volume appendix of exhibits, affidavits, photographs, deposition transcript excerpts and other documents *totalling 465 pages*. On February 24, 1992, Petitioners filed the following additional documents: a "corrected affirmative" statement of facts regarding Respondent's motion for summary judgment; a motion for "finding of facts not in dispute" and for partial summary judgment; a "corrected" statement of facts in support of Petitioners' "motion for fact finding and partial summary judgment on liability"; a "corrective" memorandum in opposition to Respondent's motion for summary judgment; and a "corrective" appendix for volume II of the exhibits filed originally in opposition to Respondent's motion for summary judgment.

Upon motion, Respondent filed a reply brief to Petitioners' opposition to summary judgment on March 6,

1992. In that reply, the Respondent set out in detail its unchanged position that despite all the documentation and affidavits, reports, photographs and memoranda filed by the Petitioners, neither Petitioners' counsel (who offered more speculative opinions than their experts) nor Petitioners' experts had yet provided any factual basis for their opinions. Further, on March 24, 1992, the Respondent filed its opposition to Petitioners' cross motion for summary judgment on liability. The central theme for that opposition was, again, that the Petitioners' experts had not identified any observed factual basis for their speculative and conclusory opinions. In response, the Petitioners filed yet another set of three (3) expert affidavits on April 1, 1992.

On May 13, 1992, not content with their fourteen (14) prior expert reports/affidavits, already filed, the Petitioners filed a motion to supplement, yet again, their opposition to Respondent's motion for summary judgment specifically requesting to be allowed to file a fourth affidavit of Nicholas Miller (accident reconstructionist) with glossy prints of photographs and a third affidavit of Norris Shoemaker, (accident reconstructionist) with exhibits. This motion was allowed by the court, thereby bringing to sixteen (16), the number of expert affidavits/reports from six (6) different experts filed with the District Court prior to the Court's decision.[2]

---

[2] The Petitioners motioned the District Court after its decision on summary judgment to vacate the judgment for purposes of filing five (5) additional affidavits and three pages of deposition transcript. The District Court denied that motion. The First Circuit affirmed that denial. However, the Petitioners have included those five (5) additional affidavits and selected portions of the deposition testimony at their Appendix p. 45-63.

None of those affidavits/reports (four (4) by Miller; two (2) by Farrell; two (2) by Huett; four (4) by Ommaya; three (3) by Shoemaker; and one (1) by Feigin) ever listed more than the two (2) factual observations (about the bumper and rear seat being pushed forward) on which it was claimed the experts' opinions were based. The accident reconstructionists, as opposed to the medical experts, all follow the same simplistic analysis that because the plow lift mechanism was an "energy focussing" component on the front of the truck, the mechanism must have penetrated the passenger compartment and struck the decedent. This, without any evidence of external head trauma being observed by any of the medical personnel except the coroner (Feigin) two days later, ignoring that the truck weighed approximately twice what the Tempo weighed, ignoring that the Tempo was stopped and the truck was going 41.2 mph at the point of impact, ignoring that the Tempo was thrown into the path of the on-coming full size Chevy van which, in turn slammed into the Tempo, spinning it 180 degrees instantly, and discounting in a single sentence by Miller, in one of his four (4) affidavits, the observation at the scene by Sargeant Porter of the roof pillar pressing down on the back of Robert Hayes, Jr.'s head right where the coroner reported the only evidence of a contusion existed. The Petitioners point to the crumpled rear of the Tempo and claim, through their experts, (all of whom the Petitioners' attorneys have used in other claims against the Respondent), in a giant leap of speculation that the lift mechanism struck the decedent and caused his death.

Thus, there was no ambush of the Petitioners regarding insufficient facts to support their experts' opinions.

The Respondent proclaimed the insufficient factual basis for the Petitioners' experts' opinions in its motion for summary judgment on January 13, 1992 with specificity and clarity detailing each of the experts' opinions provided to Respondent at that time and detailing the absence of any specific facts to support the conclusions.

The Petitioners, over the following five months, offered every fact known by anyone about the accident or the Respondents' product, relevant or not, including deposition transcripts from other law suits, police reports and photographs from accidents in other states. Tellingly, the Petitioners' experts ignored all of those materials other than to argue that the Respondent's lift mechanism is alleged to have caused other injuries and thus it must have done so in this case. Yet the experts still failed to articulate one relevant fact to support their conclusion that the Respondent's product struck the decedent or, in the alternative, (adopted by the Petitioners' part way through the process) that the Respondent's product caused crumpled sheet metal to strike the decedent, Robert Hayes, Jr.

C. The Respondent Sustained its Burden on Summary Judgment.

The Petitioners put great emphasis on the Respondent's "failure" to offer its own expert opinions in support of its motion for summary judgment. However, the Respondent satisfied its burden by simply showing an absence of an adequate basis for the Petitioners' experts' opinions.

The Respondent did not need to attack the Petitioners' experts' qualifications. The Respondent did not need to attack the Petitioners' experts' "methodology" (even though it was never even described by the Petitioners' experts), as the Respondent's burden on a Rule 56 motion was limited to pointing out to the District Court that there was an absence of evidence to support the non-moving party's case. *Celotex Corp. vs. Catrett*, 477 U.S. 317, 325 (1986). Under the circumstances, a Rule 56 motion was perfectly appropriate. ("One of the principal purposes of the Summary Judgment rule is to isolate and dispose of factually unsupported claims. . . . ") *Id.* at 323.

For their conclusions that the lift mechanism struck Robert Hayes, Jr., directly or in the alternative (which one is it?) that the lift arm thrust sheet metal like a steel glove on a hand into Robert Hayes, Jr.'s head, the experts rely on each other's conclusions (not facts) or on a very few selected photographs (reproduced in Petitioners' Appendix). However, the Petitioners did not produce photographs of the crumpled metal glove allegedly thrust into the passenger compartment; or photographs of blood or hair on the lift mechanism; or photographs of a fractured skull or of a bloody gash in the back of the decedent's head, not because the Petitioners had no time or opportunity to get those photographs or observations before the court ruled, but, because no such evidence exists.

When examined, all of the Petitioners' experts affidavits were found by both the District Court and the First Circuit to be circular, beginning not with a *factual basis* for proximate cause, but beginning with a *conclusion* of proximate cause.

The District Court and the First Circuit properly reviewed the expert affidavits and correctly found them to be without the necessary "factual basis and the process of reasoning which makes the conclusion[s] viable in order to defeat a motion for summary judgment". *Hayes vs. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993). Also, the Petitioners had every opportunity to offer all of the factual support at their disposal and were not, as they claim, improperly denied a chance to offer more.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN L. KERR, ESQ.
WHITING & ELINOFF
541 Main Street, Suite 210
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(617) 337-1230

APPENDIX

ANNEXED TO DEFENDANT'S STATEMENT OF MATERIAL FACTS – PAGE 31 FROM DEPOSITION OF GERARD MURPHY.

(234a of the Record)

Q. What's next part of that page?

A. The next part of that page is vehicle number one, and it's just, again, boxed tabulation.

One column says impact speed forward and it breaks it down into forward and lateral components. It gives impact speed for vehicle number one of 41.2 miles per hour.

Q. Did you input that?

A. No. That was calculated by the computer and it gives that back.

Q. Are any of these numbers numbers that you input?

A. No, this is output. Even the warning message and the energy that came under the warning message, that's output from the computer.

Q. Would you explain for me the speed change, the total?

A. Longitudinal and lateral. In other words, speed change or momentum or energy force or vector quantities. Vector means as a direction. So it's breaking that component of velocity in two directions, a longitudinal or horizontal component through the car and a lateral component

* * *

App. 2

PAGES 1, 48-51 FROM THE DEPOSITION OF PAUL PORTER

(29a-33a of the Record)

UNITED STATES DISTRICT COURT

District of Massachusetts

ROBERT P. HAYES, SR., Administrator,	)	
Plaintiff,	)	FILE NO. 91-10184-MA
vs.	)	
DOUGLAS DYNAMICS, INC.,	)	
Defendant.	)	

DEPOSITION of PAUL PORTER, a Witness called by and on behalf of the Defendant, held pursuant to the Massachusetts Rules of Civil Procedure, before Vincent R. Martino, a Notary Public within and for the Commonwealth of Massachusetts, held at the Law Offices of Whiting & Elinoff, 541 Main Street, South Weymouth, MA, 02190, on Tuesday, July 16, 1991, commencing at 10:00 a.m.

APPEARANCES:

Law Offices of Marc Alpert (By Marc Alpert, Esq.) 141 Tremont Street, Boston, MA 02108

Law Office of John Carroll (By Woodruff Carroll, Esq.) 100 East Washington Street, Syracuse, New York 13202

Whiting & Elinoff (By John Kerr, Esq.) 541 Main Street, South Weymouth, MA 02190

* * *

Q. Sergeant Porter, did you attend the autopsy?

A. Yes.

Q. Did you take any photographs at the autopsy?

A. Yes.

Q. Do you know where those photographs are?

A. No, I do not. They have been lost.

Q. What were they of, those photographs?

[p. 49] A. Two Polaroids of a bruise mark – let me explain this. The area, the exposed skull right behind the right ear of Bob Hayes. To explain that, in an autopsy, they actually after they do the cutting, they actually take the skin, the hair and everything and pull it over so it is down to eye level and they are able to examine the entire skull and there was a bruise, you'll see any bruising that was done. If you are hit here, it leaves a bruise on the inside and there was a bruise right here, right behind the right ear.

Q. Yes.

A. And that was the only bruise. I took two pictures of that. That was the only bruise on the body. As a matter of fact myself and the doctor, the doctor made comment to me that it is really a sin because the boy was in perfect health. There wasn't another mark on his body other than that bruise. If you looked at him without pulling back the skin, other than the monitor to release pressure, his body was fine. He took that off and saw that bruise.

Q. Did you stay for the entire autopsy?

A. Yes.

Q. The entire autopsy?

A. Yes.

Q. Okay.

A. Until we are done.

Q. Did they open up the skull during that autopsy?

A. Yes.

Q. Was there evidence of intercranial bleeding around the brain?

A. I don't recall but I don't – I don't recall. I know there was swelling, we talked of the swelling and that's what caused the death was the swelling.

Q. Okay.

A. I really don't believe there was because we talked about it. It was all the swelling that caused the death. I haven't looked at the autopsy report in years but I think that was the determination.

Q. And did that bruise behind the right ear on Bob Hayes, did that, how did this correspond in location to where I believe you testified you saw contact between his head was at rest with the pillar, the right pillar between the back window and that little corner triangular window of the Tempo? I thought you said you saw that against his head, is that correct?

A. That's just where he was.

Q. Are you saying that coincided with where you saw the contact?

A. He was sitting in the car, the seat was crushed over and he is crushed.

Q. He was bent over?

A. He's bent over like diagonally towards the driver's seat and the pillar is right there. The pillar is leaning right against him.

Q. Okay.

A. Right against the right rear of his ear. That area of the head. That's not the best one to show that.

Q. Okay.

A. I will find it here in a second.

MR. ALPERT: We were talking about, for the record, Exhibit 21.

MR. KERR: I just was holding it. He made no reference to it.

THE WITNESS: Exhibit 22.

Q. Is this the pillar here that you are talking about?

A. I believe so. I believe so. I'm looking at it here, I believe it is this here if this is one in the same. It is hard to tell with these pictures. There is the floor. There is the seat. I believe –

Q. Or this one here?

A. Here.

Q. The white one you see referring to Exhibit 21?

A. And 22.

* * *

TESTIMONY OF SERGEANT PAUL PORTER (RANDOLPH POLICE DEPARTMENT)

(214a of the Record)

Sergeant Porter testified at his deposition on July 16, 1991 at pages 47 and 48 as follows:

Page 47:

Q. . . . [D]id you see any evidence during your observation of the [sic] either the back of the Tempo or the front of the truck that had the plow frame on it, that the plow frame and specifically the arm on the plow frame that attaches to the plow, entered the rear of the Tempo?

A. I don't recall any specific physical evidence . . .

* * *

Page 48:

Q. You didn't see any specific physical evidence [on the Tempo] conforming to the shape of the plow frame?

A. I did not.

* * *

App. 7

EXCERPTS FROM PAGES 54 AND 55 OF OFFICER THISTLE'S DEPOSITION TRANSCRIPT

(213a of the Record)

* * *

Page 54:

Q. Did you see any evidence when you examined the Tempo to indicate that the plow frame, itself, entered the passenger compartment?

A. To my knowledge, no.

Q. Did you see any evidence that the plow frame even impacted the back of the Tempo; on the Tempo, I'm talking about, did you see any evidence of –

A. I didn't look for any specific evidence of the plow frame damaging the Tempo, just the front end of the Ford damaged the rear end of the Tempo.

* * *

Page 55:

Q. Even though you weren't looking for it, you didn't notice any particular evidence that the plow frame in fact made any particular damage to or caused any particular damage to the back of the Tempo?

Objection by the plaintiff's counsel.

A. No, I did not.

. . . .

Q. . . . did you observe any particular damage to any part of the plow frame on the front of the truck?

A. I didn't make note of any.

Q. And you don't today have a memory of any.

A. Particular damage, no.

* * *

EXCERPT FROM PAGE 55 OF THE DEPOSITION TESTIMONY OF WILLIAM RICHARDSON (DRIVER OF THE TRUCK)

(214a of the Record)

Mr. Richardson testified at his deposition on October 4, 1991 at page 55 as follows:

Page 55:

* * *

Q. Were you able to see the actual impact of the lift channel on the Ford vehicle as the crash occurred?

A. No.

* * *

PAGE 87 OF THE DEPOSITION OF WILLIAM RICHARDSON, DRIVER OF PICKUP TRUCK

(460a of the Record)

* * *

statement earlier about the tempo. Was the tempo moving at the time of the impact?

A. It was either slowing down – just coming to almost a stop or it was stopped.

Q. Now, you testified at one point about the lift arm. And then you testified that you couldn't look over the front. Could you see the lift arm at the point of impact? Just yes or no.

A. No.

Q. Did you actually see the lift arm impact on the back of the tempo or the back of the white Ford car?

A. No. That's like looking across the table and see'ing what he has on his belt buckle. I can't see down and over. Being the further most part of the truck, it's a very unreasonable assumption.

Q. Was the reason that you couldn't see because it was down below the front of the rise of the hood?

A. Yes. The arm was sitting like so (indicating).

Q. Did you observe after the accident whether the lift arm had sustained any damage?

A. After the accident, no. I got arrested.

* * *

(229a of the Record)

ANNEXED TO DEFENDANT'S STATEMENT OF MATERIAL FACTS--
MILTON MEDICAL CENTER EMERGENCY ROOM RECORD.

MILTON MEDICAL CENTER
MILTON, MASSACHUSETTS
EMERGENCY ROOM RECORD

☐ EMERGENT ☐ SEMI-URGENT ☐ OUTPATIENT
☐ URGENT ☐ APPOINTED ☐ TRIAGE

PATIENT NAME & ADDRESS: HAYES, ROBERT P
7 JANE ST
RANDOLPH MA 02368
PHONE NO. 961-5498 SS NO.

RELATIVE, PARENT-GUARDIAN NAME & ADDRESS: HAYES, MARY
7 JANE ST
RANDOLPH MA 02368
PHONE NO. 961-5498 REL MOTHER

GUARANTOR'S EMPLOYER NAME & ADDRESS: HAYES, ROBERT C
7 JANE ST
RANDOLPH MA 02368
PHONE NO. 961-5498

ADMIT DATE: 01/30/88 | ARRIVAL TIME: 5:46 PM | MEDICAL RECORD#: 143301 | ACCOUNT NO.: 00143051
SEX: M | D.O.B.: 02/01/73 | AGE: 15 | OCCUPATION: STUDENT
MARITAL: S | REL.: C | FAMILY PHYSICIAN:
ATTENDING PHYSICIAN: SLAGER, MICHAEL
PRIMARY INSURANCE: HEALTHWAY | POLICY NO.:
SECONDARY INSURANCE: | POLICY NO.:
NAME OF SUBSCRIBER: HAYES, ROBERT
INJURY DATE: 01/30/88 | PLACE INJURY OCCURRED:

INSURANCE ADDRESS:
EMPLOYER NAME & ADDRESS:

CONDITION ON ARRIVAL: CONSCIOUS ☐ YES ☐ NO | AMBULATORY ☐ YES ☐ NO | BROUGHT BY ☐ SELF ☐ FIRE Randolph ☐ POLICE ☐ AMBULANCE ☐ OTHER | LAST TETANUS 4/10 | TREATMENT RM T

ALLERGIES: NKA

CURRENT MEDS: NKA

PAST MED HX: Stuffy nose occ.

	MEDS GIVEN	DOSAGE	TIME	BY
#1 BP 118/66 T P 57 R	Demerol	20 IV	5:55 pm	
#2 BP T P R				

NURSING ASSESSMENT: Pt arrived by EMS c/o MVA - pt was restrained driver in MVA - c/o head pain, neck pain, back pain, and left knee pain. Pt alert and oriented x 3 at this time. Skin warm and dry. Resp. unlabored. Pt ambulatory on arrival. Pt placed in room #16A (R) and instructed to undress and put on gown. Family at bedside.

ATTENDING NURSE'S SIGNATURE: Sheila Tobin

HISTORY & MEDICAL EXAM TIME:
Pt arrives s/p victim in MVA, was back seat passenger on seat belt side. Car was struck by a truck, reportedly with great force.
Pt arrives c/o neck pain with spontaneous regular respirations. Color is good. Pupils are fully dilated & reactive. Neg. LOC reported.
No external evidence of chest trauma or facial trauma.
Minimal muscular contractions of legs to pain - No spontaneous movement to legs noted.
Lungs CTA - breath sounds equal, clear.
No deformities of chest wall. Chest soft, nontender, no crepitus.
Xrays of knee (R) knee, chest, left hip, left knee to be done.
Discussed w Dr. Sumter at MGH. Will transfer pt.
Hct - 47
20 mg IV Demerol
Morphine 25 mg IV

DIAGNOSIS: MVA, Multiple Trauma

INSTRUCTIONS TO PATIENT: Foley catheter - urine specimen sent to lab. Intubated and transferred to MGH via ambulance.

V + C
1. Sounds.
2.
3. Lt C-spine
1. Lt C-spine
2. Cervical C-7
3. C-Spine with out (R) elbow

INSTRUCTION SHEET GIVEN
☐ WOUND ☐ HEAD ☐ DIET
☐ SPRAIN ☐ BACK
☐ NOSEBLEED ☐ CAST

DISPOSITION
☐ HOME ☐ ADMIT ☐ TRANSF

REFERRED TO

R.N. NAME	DOCTOR'S SIGNATURE	PATIENT SIGNATURE	DATE	TIME DISCHARGED
PATIENT VERBALIZES UNDERSTANDING OF INSTRUCTIONS	[signature], M.D.			

MILTON MEDICAL CENTER FORM 60 REV. 2/88

F33.8

App. 11

BEST AVAILABLE COPY

No. 93-1455

Supreme Court, U.S.
FILED
MAY 10 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES,
PETITIONER,

v.

DOUGLAS DYNAMICS, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

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A. 3

THERE WERE NO LOWER COURT RULINGS REFERRING TO OR PLACING RELIANCE UPON SECTION 702 OF THE FEDERAL RULES OF EVIDENCE NOR WERE THERE ANY ADMISSIBILITY CLAIMS DETERMINED OR RELIED UPON BY THE LOWER COURT

B. 5

THE RECORD MAKES IT CLEAR THAT THE PLAINTIFF-PETITIONERS WERE NOT GIVEN AN OPPORTUNITY PRIOR TO FINAL DECISION AND JUDGMENT TO ANSWER THE ALTERNATIVE CAUSE OF ACCIDENT THEORY OF THE LOWER COURT AND THE OTHER NEWLY FOUND FINDINGS OF THE COURT

C. 6

THE LOWER COURTS DID IN FACT WEIGH THE EXPERT OPINION AND DID IN FACT DETERMINE EXPERT AND OTHER CREDIBILITY AND DID FAIL TO GRANT FAVORABLE INFERENCES TO THE PLAINTIFF AND THUS INVADED THE JURY FUNCTION AND THE SEVENTH AMENDMENT TO THE CONSTITUTION

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CONCLUSION 8

THIS CASE OFFERS AN OPPORTUNITY FOR THE COURT FOR THE FIRST TIME TO RULE UPON THE MEANING AND APPLICATION OF SECTION 705 OF THE FEDERAL RULES OF EVIDENCE TO SUMMARY JUDGMENT MOTIONS. ADDITIONALLY IT OFFERS SPECIFIC CONCRETE ISSUES OF EVIDENCE USE AND EVALUATION USEFUL TO DEFINE THE ROLE OF THE JUDICIARY. THE CIRCUITS ARE IN CONFLICT IN AN AREA INVOLVING HUNDREDS OF CASES ANNUALLY. ONLY THIS COURT CAN RESTORE THE CONGRESSIONALLY MANDATED UNIFORMITY TO THE FEDERAL SYSTEM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1455

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
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v.

DOUGLAS DYNAMICS, INC.,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

SUMMARY OF ARGUMENT

Contrary to the assertions of the Defendant in its opposing brief, nowhere in either of the Lower Court decisions in this case is there any reference to Section 702 of the Federal Rules of Evidence (Pet. Cert. pgs 1, 16a). On the contrary the Lower Courts reviewed the Petitioners expert affidavits. It found them to prove the Respondents product, i.e. the lift mechanism was a possible cause but not a probable cause of injury (Pet. Cert. pg. 15a).

The Lower Court rulings solely cited Section 705 of the Federal Rules of Evidence (Pet. Cert. App. 8a). That Sec-

tion deals solely with expert opinion i.e. the use of admitted evidence, not admissibility. Admissibility is covered at Section 702 of the Federal Rules of Evidence.

The Lower Court specifically and squarely determined Section 705 of the Federal Rules of Evidence did not apply on a Summary Judgment motion (Pet. Cert. App. 8a).

Therefor this case raises squarely the issue of whether Section 705 applies on a summary judgment motion and if so what is its effect upon Rule 56 of the Federal Rules of Evidence.

In other Circuits Section 705 of the Federal Rules of Evidence has been held to preclude further inquiry into expert affidavits, and to require notice and opportunity to respond to alleged defects, such as the newly discovered alternate cause of injury from the metal pillar before Final Judgment (Pet. Cert. pg. 18 et. seq.).

The difference is significant because the Petitioner would have had its counter proof before the Circuit Court as a matter of right instead of having to hurdle its proof past the barriers of discretion that apply to post judgment motions to reopen or for reconsideration and thus loose the presence of this proof for appellate review.

In this case the Petitioners received their first notice of the court determined grounds for objection to the expert affidavits in the Final Decision and order. These events occurred simultaneously. There was no prior notice given the Petitioners although such notice had been requested. Post judgment additional proof motions were made and denied on a discretionary as is (Pet. Cert. pg. 6a) On Appeal the First Circuit held that the proffered post judgment proof was not before that Court since the Plaintiffs had no right to such relief except in the discretion of the District Court. (Pet. Cert. App. 6a)

In any other Circuit the result would have been different (Pet. Cert. pgs. 10-25).

Contrary to the assertions of the Defendant the Lower Courts did in fact weigh the evidence and determine expert credibility and did invade the expert field, a field for which they were not trained or qualified to second guess the experts. In so doing they supplanted the jury and invaded the Plaintiffs rights under the Seventh Amendment to the Constitution.

ARGUMENT

A.

THERE WERE NO LOWER COURT RULINGS REFERRING TO OR PLACING RELIANCE UPON SECTION 702 OF THE FEDERAL RULES OF EVIDENCE NOR WERE THERE ANY ADMISSIBILITY CLAIMS DETERMINED OR RELIED UPON BY THE LOWER COURT.

The Defendant Respondent asserts in its opposition to the motion for a Writ of Certiorari that as a legal and factual matter the case in the Lower Court was resolved on admissibility rulings. This assertion is in error. There are no court rulings on admissibility at all. No reference was made to Rule 702 of the Federal Rules of Evidence in either the District Court or the First Circuit Court of Appeals (Pet. Cert. pgs. 1a, 16a).

The decision was squarely placed upon Federal Rule 705 and Rule 56 of the Rules of Civil Procedure. (Pet. Cert. App. 8a). Rule 705 was found to not apply where Rule 56 was involved. There is no such language direct or indirect in the Section.

Thus both of the Lower Court decisions were solely based upon the courts view of the sufficiency of the evidence to prove causation not admissibility.

Therefore the reliance of the Defendant Respondent upon Section 702 of the Federal Rules of Evidence, and upon the decision of this court in *Daubert v. Merrill Dow Pharmaceutical Inc.*, 113 S. Ct. 2786 (1993) is misplaced.

In any event the *Daubert* decision (*supra*) does not hold that where expert methodology employed was standard for the expertise as was certified to in this record (Pet. Cert. App. 19a) and that fact is without opposition in the record that the court may nevertheless proceed to displace the jury and find the opinion is entitled to no weight because to the courts untrained eye pictures and other proof when evaluated by non expert judges indicates a contrary position exists. Further the *Daubert* decision dealt with Section 702 of the Federal Rules of Evidence dealing with admissibility of scientific and technical evidence, neither of which are issues in this case.

Further the *Daubert* decision (*supra*) reviewed the qualifications of the experts. In our case there is no issue but that the medical expert Dr. Ommaya is an internationally recognized expert in head trauma and the former head of the medical aspects of the National Highway Safety Commission. The Boston Medical Coroner works in trauma in a major city. Norris Shoemaker since 1955 has worked solely in highway automotive safety and is a nationally recognized expert, as is Nickolas Miller the accident reconstructionist. On their credentials alone the opinions of these experts are entitled to consideration.

There has been no prior Supreme Court ruling on the relationship between Rule 56 of the Rules of Civil Procedure and Section 705 of the Federal Rules of Evidence. The split in the Circuits created by this decision needs to be resolved by this court which is the only organ of government remaining to enforce the Congressional intent that there be uniformity in the application of evidence in the Lower Courts.

B.

THE RECORD MAKES IT CLEAR THAT THE PLAINTIFF-PETITIONERS WERE NOT GIVEN AN OPPORTUNITY PRIOR TO FINAL DECISION AND JUDGMENT TO ANSWER THE ALTERNATIVE CAUSE OF ACCIDENT THEORY OF THE LOWER COURT AND THE OTHER NEWLY FOUND FINDINGS OF THE COURT.

The District Court entered its decision and final judgment simultaneously before offering the Petitioner the opportunity to respond to the newly found reasons for dismissal. This procedure is deemed to be required by Section 705 of the Federal Rules of Evidence in other Circuits (Pet. Cert. Pg. 18a).

In this case the issue was not an abstract issue. Among the newly found matters and arguments advanced by the District Court was the argument first advanced in its final decision that there was an alternative cause of death of Robert Hayes Jr. not considered by the Plaintiffs experts, to wit death from a blow from a piece of metal found near the deceased. This was held to prohibit a finding of probability of death from the lift mechanism (Pet. App. pg. 24a, 25a). This was the first time such an alternative cause argument on such a basis had been advanced. It was not prior to that time advanced by the Respondent. The Lower court relied upon the existence of that cause in dismissing the action. (Pet. Cert. pg. 24a, 25a). It found that while the Petitioner had proved a possible cause, because of the existence of the alternative cause the plaintiff have not proven that is cause was a probable cause. (Pet. Cert. App. 14a).

The Plaintiff thus foreclosed from responding to the error in the courts analysis before final decision and judgment moved for the right to submit post judgment proof on this and other points of error or misunderstanding (Pet. Cert. App. 6a). These motions were denied in the Lower Court and appealed

to the First Circuit (Pet. Cert. App. 6a). There, instead of applying the rule in other Circuits, that Circuit affirmed the right of the Lower Court to render judgment before notice and opportunity to respond by the Plaintiff (Pet. Cert. App. 6a) The court did so expressly on the basis that such a right was not conferred upon the Petitioner under Federal Rule of Evidence Section 705 (Pet. Cert. App. 8a). It is the only Circuit in the United States to so Rule (Pet. Cert. pgs. 10-24) and this claim does not appear to be contested in the Respondents answering brief.

This issue has not yet been ruled upon by this Court. It is squarely presented by this record.

Thus the record belies the claims of the Respondent that there is no such issue in this case.

C.

THE LOWER COURTS DID IN FACT WEIGH THE EXPERT OPINION AND DID IN FACT DETERMINE THE EXPERT AND OTHER CREDIBILITY AND DID FAIL TO GRANT FAVORABLE INFERENCES TO THE PLAINTIFF AND THUS INVADED THE JURY FUNCTION AND THE SEVENTH AMENDMENT TO THE CONSTITUTION.

The Lower Court found that the scene police pictures presented a "mangled mass" of damage (Pet. Cert. App. 7a). It claimed the right to examine those pictures and determine whether the experts claims of discernment of wedge marks left by the lift mechanism in the pictures were observable to their lay eyes (Pet. Cert. App. 8a). Similarly the Lower Court claimed the right to examine the autopsy photographs of the deceased to see if a "U" shaped mark on the deceased scalp and brain identified as being present at the time of autopsy by the Boston Public Coroner's office was observable to their lay eyes (Pet. Cert. App. 13a).

Thus in these two instances the Lower Court without training in accident reconstruction, and without medical or pathology training by the exercise of lay judgment determined that these two vital pieces of evidence and the accompanying testimony were not to be given weight given them by the experts and that the experts were not credible. They thus invaded the jury's function and at the minimum made rulings that might better be deferred until trial when the witness is present and a colloquy between the witness and the Judge can enlighten the Judge and make more fair his ruling. Obviously, the First Circuit does not view a case dismissal as serious enough for such care.

In the case of the scene pictures there was no question even in the Lower Court's mind that the pictures showed damage (Pet. Cert. 7a). It was the location and character of the damage that was questioned. That required expert determination. In the case of the autopsy picture there are clear marks on the scalp and brain. It requires a medical education and pathology training to thereafter evaluate the pictures and testimony.

The Lower Court could not qualify in any court as an expert in the matters it attempted to resolve on its own expert unaided view. Yet that did not prevent the court from dismissing a mother's death action.

Similarly the Lower Court did not allow any inference to be drawn from such testimony despite the right of the Plaintiff to all inferences in its favor (Pet. Cert. App. 13a).

Thus contrary to the assertions of the Respondent the Lower Court did weigh the evidence and determine credibility and did substitute its own judgment for that of the experts and the jury, all in violation of the Seventh Amendment to the Constitution.

In addition the court failed to grant the Petitioner the simplest inferences in its favor. For example the truck driver who saw the accident testified that he knew where the lift mechanism was located, i.e. on the center of the truck. He saw where the center of the truck was located at the time of impact. The Lower Court failed to grant the Plaintiff the obvious inference that the lift mechanism impacted at the point where the center of the truck was located a point directly in line with the deceased seat because the witness did not actually see the impact of the lift mechanism. (Pet. Cert. 9a).

Likewise the Lower Court weighed and failed to give favorable inferences from the investigating officers testimony at the Grand Jury Hearing before this lawsuit was commenced. (Pet. Cert. pg. 34a)

CONCLUSION

THIS CASE OFFERS AN OPPORTUNITY FOR THE COURT FOR THE FIRST TIME TO RULE UPON THE MEANING AND APPLICATION OF SECTION 705 OF THE FEDERAL RULES OF EVIDENCE TO SUMMARY JUDGMENT MOTIONS, ADDITIONALLY IT OFFERS SPECIFIC CONCRETE ISSUES OF EVIDENCE USE AND EVALUATION USEFUL TO DEFINE THE ROLE OF THE JUDICIARY. THE CIRCUITS ARE IN CONFLICT IN AN AREA INVOLVING HUNDREDS OF CASES ANNUALLY. ONLY THIS COURT CAN RESTORE THE CONGRESSIONALLY MANDATED UNIFORMITY TO THE FEDERAL SYSTEM.

The First Circuit has in fact consciously made a policy decision to cut off product liability suits at the pass. That is the function of Congress not the Courts. It further determined to throw down the gauntlet to every other Circuit and this court. Without Certiorari the Congressional intent that the Rules be uniformly applied will not be achieved. The Congress

has not withdrawn Rule 705 from summary judgment motions. That has been engrafted upon that section by the First Circuit. Only this court has such a right. The issue raised has direct impact upon hundreds of pending and future law suits, and well merits the time of this court.

This case is useful to the court because it offers the court an opportunity to also define the role of the Judge in specific evaluation of specific evidence not only expert proof but other proof such as the picture evaluation that occurred herein all in one suit.

Respectfully submitted,

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